Nos. 82-1186, 82-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 82-1186 and Respondent in No. 82-1465

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August 29, 1983

QUESTIONS PRESENTED

1. Whether the courts of the United States may abrogate a provision of a treaty which is both constitutionally sound and capable of enforcement?

2. Whether the court of appeals erroneously failed to exercise its constitutional responsibility to construe the Warsaw Convention's limitation of liability provisions to effectuate the intent of the signatory States in light of changed circumstances?

3. What is the proper conversion factor for the gold franc provisions of the Warsaw Convention in view of the unequivocal intent of the Convention's signatories to fix air carrier limits of liability at a predictable, stable and definite level?

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PRELIMINARY STATEMENT

Trans World Airlines, Inc. ("TWA"),[1] petitioner in No. 82-1186 and respondent in No. 82-1465, respectfully submits this brief on the merits in these consolidated cases.[2]

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1 In compliance with Rule 28.1 of this Court, TWA states that as of the date hereof 81.34 percent of its common shares are owned by Trans World Corporation and 18.66 percent of its shares are publicly held.

2 Cases No. 82-1186 and No. 82-1465 were consolidated pursuant to an Order of this Court entered on June 13, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 690 F.2d 303 (2d Cir. 1982) and is reprinted in the Joint Appendix hereto at JA190.[3] The opinion of the United States District Court for the Southern District of New York is reported at 525 F. Supp. 1288 (S.D.N.Y. 1981) and is reprinted at JA187.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1) (1976). Both TWA and Respondents-Petitioners Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") petitioned this Court for writs of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. On June 13, 1983, both petitions for certiorari were granted. 51 U.S.L.W. 3879 (U.S. June 13, 1983) (Nos. 82-1186 and 82-1465).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Article II, Section 2, Clause 2 of the United States Constitution and Article 22 of the Warsaw Convention are involved herein.[4]

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3 References in the form "JA____" are to the Joint Appendix to these consolidated cases.

4 The applicable provisions of the United States Constitution and the Warsaw Convention are set forth in the Appendix to TWA's petition for certiorari at A34 and A35, respectively.

All references to the "Warsaw Convention" or to the "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1976).

STATEMENT OF THE CASE

Introduction

This action arises out of the loss, during a TWA flight, of four packages of numismatic materials allegedly valued at $250,000. Since it is undisputed that the Warsaw Convention provides the sole basis for liability herein (JA15-16), the only question before the lower courts was the proper interpretation of the limitation of liability provisions of that Convention. In view of that narrow question, both the legal and factual background of the action were stipulated to by the parties and ordered by the district court in a Stipulation and Pre-Motion Order (the "Pre-Motion Order"). (JA13).

The Pre-Motion Order provides that the Warsaw Convention governs the legal relationship between the parties (JA15);[5] that the sole basis for liability herein arises under the Convention (JA15-16); and that TWA is entitled to limit its liability in accordance with the provisions of Article 22 thereof. (JA15-16). With respect to the basic facts underlying the action, the Pre-Motion Order provides that the four packages of numismatic materials in question, weighing 714 pounds (JA14-15), were delivered by Franklin Mint to TWA for shipment by air to London Heathrow Airport, England (JA15); that the total freight charge to Franklin Mint was $544.96 (JA15); that Franklin Mint made no special declaration of value at the time the packages were delivered to TWA[6] (JA15); and that the shipment never reached its destination. (JA15).

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5 The Warsaw Convention is applicable to all carriage which falls within the definition of "international transportation" set forth in Article 1(2) thereof. As the Pre-Motion Order provides, the carriage in question is within that definition. (JA15).

6 Franklin Mint could have avoided the Convention's limitation of liability by making a special declaration of value pursuant to Article 22(2) and paying an additional charge for full coverage. However, it chose not to do so. (JA15). It can only be assumed that Franklin Mint, an experienced and sophisticated shipper of air freight, chose to insulate itself against the risk of loss through its own insurance.

In accordance with the terms of the Pre-Motion Order, TWA moved for partial summary judgment seeking to limit its maximum liability pursuant to Article 22 of the Warsaw Convention (JA187, 525 F. Supp. at 1289); the district court granted TWA's motion, limiting its liability to $6,475.98 (JA189, 525 F. Supp. at 1289); Franklin Mint moved for reargument, which was denied and, thereafter, appealed.

On appeal, the Second Circuit, although technically affirming the district court's decision, held that 60 days from the issuance of its mandate the Convention's limit on liability would be "unenforceable in United States Courts."[7] (JA209, 690 F.2d at 311-12). Subsequent to the Second Circuit's denial of TWA's petition for a rehearing, TWA petitioned this Court for certiorari primarily on the ground that by prospectively abrogating the Convention's limitation of liability provisions, the Second Circuit exceeded its constitutional powers. Franklin Mint responded to TWA's petition with its own petition for certiorari, contending that the Second Circuit's decision should not have been limited to prospective application. On June 13, 1983, this Court granted both petitions for certiorari.

The Warsaw Convention

The Warsaw Convention was drafted at international conferences held in Paris in 1925 and in Warsaw in 1929. It was adhered to in 1934 by the United States, which continues to regard the Convention as a binding international agreement. *See* U.S. Dep't of State, *Treaties in Force* 207-08 (1983). The Convention is in force in more than 120 States[8] and is of unquestionable significance to the aviation industry:

> [T]he Warsaw Convention is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely

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7 Upon the motion of TWA, the Second Circuit has stayed the issuance of its mandate pending this Court's decision. (JA210).

8 A list of the nations adhering to the Convention is contained in U.S. Dep't of State, *Treaties in Force* 207-08 (1983).

adopted of all treaties . . . . (A. Lowenfeld, *Aviation Law* § 4.11, at 7-98 (2d ed. 1981)).

The essential purposes of the Convention are: (i) "to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede . . . the scores of differing domestic laws" (*Reed v. Wiser,* 555 F.2d 1079, 1090 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977)); (ii) to limit the maximum extent of a carrier's potential liability for damages (*see* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 499-500 (1967)); and (iii) to set a "reliable and consistent basis for recovery for injury or damage to persons or property" ("Warsaw Convention Liability Limits," Memorandum prepared by John Golden, Director, Bureau of Compliance and Consumer Protection,[9] Civil Aeronautics Board, dated May 20, 1981 (the "Golden Memorandum"))[10] (JA34), which would provide uniform recoveries for claimants and foreseeable and insurable liabilities for airlines (*see* Report of Secretary of State Cordell Hull, Mar. 31, 1934, [1934] U.S. Av. R. 240, 242).

The Limitation of Liability and the Changing Role of Gold in the World Economy

In order to ensure that the limits of liability under the Convention would remain uniform and stable, the drafters of the Convention expressed the limitation in terms of the French

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9 This Bureau is now known as the Office of Congressional, Community and Consumer Affairs.

10 The staff of the Civil Aeronautics Board (the "CAB") has prepared several memoranda concerning the method for converting Warsaw gold francs into United States currency: the Golden Memorandum mentioned above (JA33); a Memorandum prepared by Jeffrey Gaynes, Legal Division, Bureau of International Aviation, CAB, dated April 18, 1980 (JA60); and a Memorandum by Patricia Kennedy, Policy Development Division, Bureau of Consumer Protection, CAB, dated March 18, 1980 (JA42).

gold franc (colloquially known as the Poincaré franc) which was defined as consisting of 65-1/2 milligrams of gold of millesimal fineness nine hundred.[11] The actual limit of liability was fixed at 250 French gold francs per kilogram of lost cargo (Article 22(2)), convertible into national currency in round figures (Article 22(4)).[12]

The use of a gold franc clause as a medium of conversion is readily understandable when it is considered in light of the international gold exchange system in existence when the Convention was drafted.

> In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. . . .
>
> The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. (Golden Memorandum, *supra* p. 5, at JA36).

Thus, the Warsaw signatories adopted a limitation of liability based upon a gold franc clause in order to ensure stable and predictable limits of liability (*see* Asser, *supra* note 11, at 664); "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency" (H. Drion, *Limitations of Liabilities in International Air Law* 183 (1954)); and to assure that damages awarded by different countries would be uniform in value (*see* Asser, *supra* note 11, at 664).

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11 The French gold franc takes its common name from the French prime minister under whose government its gold content was set. *See* Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, at 645 (1974) (hereinafter "Asser").

12 The relevant text of Article 22 is quoted *infra* p. 22.

A review of the *travaux préparatoires*[13] of the Convention confirms that the gold value clause was employed in order to provide stable and foreseeable limits of liability.

As the Swiss delegate stated:

> Naturally, when we prepared our text, the French franc was variable, it has been stabilized since. But the fact that a currency has been stabilized does not imply that it is a final thing; a law can always modify another law. For this reason, in Switzerland, we have preferred to stick to the gold standard . . . .
>
> We would not be opposed to refer to the French franc, but to the gold French franc, that is to say, based on a weight of gold at such and such one thousandth.
>
> Naturally, one can say "French franc" but the French franc, it's your national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision. We must base ourselves on an international value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, but let's take a gold value. (R. Horner & D. Legrez, *Second International Conference on Private Aeronautical Law, Minutes, Warsaw, October 4-12, 1929,* at 89-90 (1975)).

Indeed, from the inception of the Convention until 1968, gold clearly provided the stability and insulation from unilateral acts of devaluation by individual nations, which the drafters intended. Converting the Article 22 limitation into United States dollars involved nothing more than a simple mathematical computation employing the official rate of gold

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13 The *travaux préparatoires,* or legislative history, clearly provide a basis for ascertaining the treaty's purposes and intent. *See, e.g., Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-32 (1943); *Cook v. United States,* 288 U.S. 102, 112 (1933); *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 34 (2d Cir. 1975), *cert. denied,* 429 U.S. 890 (1976); *Block v. Compagnie Nationale Air France,* 386 F.2d 323, 336-38 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968).

(then the only rate of gold) which remained virtually stable throughout that period. (JA24; *see* graph at JA30).

However, for a variety of reasons arising from a changing world economy, the central banks of most States instituted procedures in 1968 which separated their official gold transactions from other gold dealings. (JA21). This resulted in a "two-tier" period, during which the stable official price of gold existed side by side with a constantly fluctuating commodity price for gold. (JA21).

Notwithstanding the existence of both an official price and a market price for gold throughout the two-tier period, there was no difficulty converting the Article 22 limitation into United States currency. Pursuant to a series of CAB orders, the Warsaw gold provisions were converted into national currency at the official rate of gold, and the presently controlling CAB regulation, Order 74-1-16, dated January 3, 1974, so provides.[14]

In fact, it was not until 1978, when the International Monetary Fund (the "IMF")[15] member nations ceased employing an official price of gold for most purposes, that any question of law arose in the United States with respect to the method of conversion under the Warsaw gold provisions. Although the two-tier system had been in effect since 1968, the market price of gold did not differ significantly from the official rate of $35 per ounce until 1970, when this situation began to change radically. (JA21). Thus, in late 1973, when the official price of

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14 The full text of Order 74-1-16 is set forth at JA54.

15 The IMF is affiliated with the United Nations. It was organized at the Bretton Woods Conference in 1944 to promote international monetary cooperation, to facilitate the growth of international trade, and to assist in the establishment of a multilateral system of payments for currency transactions among member States. (JA19-20). The United States became a member of the IMF in 1945. Articles of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39; enabling legislation, Bretton Woods Agreements Act of 1945, Pub. L. No. 79-171, 59 Stat. 512, codified at 22 U.S.C. § 286 (1976).

gold was fixed at $42.22 an ounce, the commodity price of gold rose to $200 an ounce. (JA24). Finally, in 1975, in an attempt to ameliorate the severe economic pressures resulting from this instability in the price of gold, the IMF formulated a plan, known as the Jamaica Accords, to delete most references to gold in its Articles of Agreement and to replace the official function of gold with Special Drawing Rights ("SDRs"). Articles of Agreement of the International Monetary Fund (Second Amendment), *approved* Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 (hereinafter "Second Amendment to the IMF Articles of Agreement"); enabling legislation, Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660, codified at 22 U.S.C. § 286e-5 (1976). (*See* discussion at JA21-22).[16]

As is fully set forth in the record, and as was undisputed in the courts below, the SDR is a stable international unit of account, valued on the basis of a basket of five national currencies, which does not have a competing use as a commodity. (JA22-23). Thus, SDRs are insulated from free market speculation and other difficulties which led to instability in the price of gold and to the ultimate breakdown of gold as an international unit of account. (JA23). Employed as a medium of exchange between governments, central banks and the IMF, SDRs have replaced gold's international monetary function

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16 The concept of Special Drawing Rights was approved by the Board of Governors of the IMF in 1967. Under the IMF's plan, a "Special Drawing Account" was established to facilitate transactions among members, and SDRs became a supplement to existing reserve assets. Member States were allocated a number of SDRs, and a State having a balance of payments deficit could use them to settle its accounts by selling them to an IMF designated country. Designated countries were obligated to take SDRs and to provide convertible currency in return. Although SDRs were initially valued in terms of gold (1 SDR equal to 0.888671 gram of fine gold, which was equal to $1 U.S. at the rate of $35.00 per ounce), the Second Amendment to the IMF Articles of Agreement severed the link between gold and SDRs for virtually all purposes. (JA21-22). *See* Silard, *Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules*, 10 J. Mar. L. & Com. 13, 18 (1978).

and "serve as the cornerstone of the new international system of finance." P. Samuelson, *Economics* 612 (11th ed. 1980); *see* Gold, *Gold in International Monetary Law: Change, Uncertainty, and Ambiguity*, 15 J. Int'l L. & Econ. 323, 354 (1981). As a result, "[t]he SDR has first claim to recognition as the unit of account to replace gold in universal international organizations." J. Gold, *SDRs, Currencies, and Gold*, IMF Pamphlet Series No. 33, at 96 (1980).[17]

In sum, since the demise of the two-tier system, SDRs have become the international unit of account and gold has become a fluctuating commodity which varies in value in the same manner as any other commodity, such as wheat, silver, soybeans or pork bellies. (JA19, 24-25; *see* graph at JA32).

The Montreal Protocols

Realizing that gold's new status affected its viability as a conversion factor for the Convention's limitation of liability provisions, the Warsaw signatories met at Montreal in 1975 to attempt "to deal with the changes in the role of gold in international monetary transactions." Golden Memorandum, *supra* p. 5, at JA39. Their solution, embodied in the Montreal Protocols, was the substitution of SDRs for gold as the conversion factor for the limitation of liability provisions of Article 22.[18] The decision in favor of SDRs was based on the

17 At least 17 international organizations and 14 multilateral agreements have adopted the SDR as the unit of account for a variety of purposes, including use as a factor for converting gold value clauses contained in international agreements (drafted prior to the time gold became a fluctuating commodity) into national currencies. *See* J. Gold, *SDRs, Currencies, and Gold, supra*, at 37-39.

18 There have been three prior modifications of the Warsaw System: (i) the Hague Protocol, *done* Sept. 28, 1955, 478 U.N.T.S. 371, *reprinted in* A. Lowenfeld, *Aviation Law* 955 (2d ed. Doc. Supp. 1981); (ii) the Montreal Agreement of 1966, a private agreement among most international air carriers, *reprinted in* A. Lowenfeld, *Aviation Law* 971 (2d ed. Doc. Supp. 1981); and (iii) the Guatemala City Protocol, *done* Mar. 8, 1971, *reprinted in* A. Lowenfeld, *Aviation Law* 975 (2d ed. Doc. Supp. 1981). Although neither the Hague Protocol nor the Guatemala City Protocol has been ratified by the United States, both

(footnote continued on following page)

fact that SDRs are relatively stable, have replaced gold as the international unit of account, and will effectuate the drafters' goal of predictable and stable limits of liability. *See* Golden Memorandum, *supra* p. 5, at JA39.

As one commentator has observed:

> [T]he new Warsaw limit [using SDRs as the unit of account] is intended to be as faithful a translation as possible of . . . poincaré francs at the "old" official price for gold. (McGilchrist, *Four New Protocols to the Warsaw Convention,* 1976 Lloyd's Mar. & Com. L. Q. 186, 187).

During the meetings at Montreal, the United States "took the lead" in suggesting SDRs as the standard of conversion[19] and signed Protocols 3 and 4,[20] which adopt SDRs as the Article 22 unit of account. On November 17, 1981, the Senate Committee on Foreign Relations reported in favor of ratification of those Protocols. Senate Comm. on Foreign Relations, Montreal Aviation Protocols Nos. 3 and 4, S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 5 (1981). However, on March 8, 1983, the United States Senate, by a vote of 50 to 42 in favor of ratification of Montreal Protocols 3 and 4, withheld its consent to those Protocols. Thereafter, the majority leader moved for reconsideration and the matter remains on the Senate calendar. Senate Exec. Sess., Montreal Aviation Protocols Nos. 3 and 4, 129 Cong. Rec. S2270, S2279 (daily ed. Mar. 8, 1983) (statement of Sen. Baker).

(footnote continued from previous page)

Protocols provide for definite and fixed limits of liability and have been looked to as indicia of the signatories' subsequent conduct for purposes of construing provisions of the Convention. *See, e.g., Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 36 n.15 (2d Cir. 1975), *cert. denied,* 429 U.S. 890 (1976).

19 *See* A. Lowenfeld, *Aviation Law* § 6.51, at 7-171 (2d ed. 1981); *see also* Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air,* 42 J. Air L. & Com. 273, 325, 329-30 (1976).

20 Protocols 3 and 4 are reprinted in A. Lowenfeld, *Aviation Law* 985 (2d ed. Doc. Supp. 1981).

The Decisions of the Courts Below

TWA moved for partial summary judgment seeking to limit its liability in accordance with Article 22 of the Warsaw Convention. TWA argued that the Warsaw gold provisions might be converted into United States currency by three alternative methods: (i) the last official price of gold in the United States; (ii) the SDR; and (iii) the exchange value of the modern French franc. (JA188, 525 F. Supp. at 1289). Franklin Mint responded that the appropriate basis for conversion is the market price of gold. (JA188, 525 F. Supp. at 1289).[21]

After briefing and oral argument, the district court concluded that the appropriate conversion factor is "the last official price of gold in the United States." (JA189, 525 F. Supp. at 1289). That holding was based upon the fact that the last official price of gold "has—arguably, at least—been espoused by the Civil Aeronautics Board ('CAB'), the government agency most intimately concerned with the transaction at hand" and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation." (JA188, 525 F. Supp. at 1289).

Although the court of appeals technically affirmed the district court's decision, it also held, *sua sponte*, that 60 days after the issuance of its mandate, the Warsaw limitation of liability provisions would become "unenforceable in United States Courts." (JA209, 690 F.2d at 311-12). The Second Circuit based its decision upon the determination that each of the potential conversion units proffered by the parties "ap-

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21 In both the district court and the court of appeals, TWA argued that the modern French franc might be employed as a conversion factor for the Warsaw gold provisions because it is infinitely more stable than the market price of gold. Although there is some authority for this position (*see Kinney Shoe Corp. v. Alitalia Airlines*, 15 Av. Cas. (CCH) 18,509 (S.D.N.Y. 1980)), as will be demonstrated below, either the last official price of gold or SDRs is the most appropriate conversion factor. Therefore, TWA will not submit further argument with respect to the modern French franc as a potential third choice.

pears to have a devastating argument against it." (JA195, 690 F.2d at 306). As a result, the Second Circuit concluded:

> While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts. (JA195, 690 F.2d at 306).

As will be demonstrated below, neither the Second Circuit's reasoning nor its conclusion can withstand scrutiny. It is not only possible for the courts to select a unit of account without engaging in a forbidden policy decision; under settled principles of law it is their duty to do so.

SUMMARY OF ARGUMENT

In declaring the Warsaw Convention's limitation of liability provisions unenforceable, the Second Circuit noted that it had no power to abrogate a treaty, but rather that the power to do so resides in the coordinate branches of the government. Having reached that conclusion, the Second Circuit found Congress' repeal of the Par Value Modification Act, which set the official price for gold in the United States, to have effectively abrogated the Warsaw Convention, inasmuch as that repeal led the court to reject the only conversion factor which it viewed as otherwise viable—the last official price of gold. However, in so holding, the Second Circuit totally ignored the well-settled rule that a treaty will not be deemed to be abrogated or modified by a later statute unless such purpose on the part of Congress has been affirmatively expressed. As the statute repealing the Par Value Modification Act makes no reference to the Warsaw Convention and the Second Circuit pointed to no other congressional or executive act impinging upon the Warsaw limits, those limits clearly must be enforced.

The foregoing conclusion is underscored by the fact that no other signatory nation which has considered the issue has found the Warsaw limits unenforceable, as well as by the fact that the Executive, the governmental branch most intimately concerned with the conduct of foreign policy, has specifically stated that it views the Warsaw limits to be a binding treaty obligation of the United States.

As the Warsaw limits have not been abrogated by the coordinate branches of the government and cannot be abrogated by the courts, the judiciary must, under settled canons of construction, interpret the Convention in a manner which will carry out the intent of its drafters. There is no doubt that the drafters stated the limits in terms of a gold value clause in order to ensure stable and predictable limits of liability. Since use of the market price of gold as the conversion factor would result in widely fluctuating and unpredictable limits, it is clear that the last official price of gold, the use of which would lead to the stable limits envisioned by the drafters, is the proper conversion factor. The last official price of gold has consistently been applied as the conversion factor in the United States and is the medium of conversion employed by the presently controlling CAB order. In short, use of the last official price of gold is consistent with Constitutional requirements, with the canons of treaty construction, and with long-standing usage in the United States.

Although use of the last official price of gold as the Warsaw conversion factor would fully comport with both Constitutional requirements and the canons of treaty construction, SDRs are an alternative conversion factor which would also conform to the foregoing criteria. SDRs are a stable international unit of account; they have taken the place of gold in the world economy; and they are easily converted into gold value by a formula which has been accepted by various segments of the international community. As a result, the use of SDRs would fully comply with the drafters' intent. Therefore, SDRs are an appropriate alternative to the last official price of gold as the Warsaw conversion factor.

ARGUMENT

POINT I

THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL POWERS BY ABROGATING THE LIMITATION OF LIABILITY PROVISIONS OF THE WARSAW CONVENTION—THOSE PROVISIONS SHOULD CONTINUE TO BE ENFORCED EMPLOYING THE LAST OFFICIAL PRICE OF GOLD AS THE CONVERSION FACTOR

In declaring the limitation of liability provisions of the Warsaw Convention unenforceable, the court of appeals was clearly mindful that its decision touched upon delicate constitutional questions relating to the separation of powers between the judiciary and the other branches of the federal government. Indeed, the Second Circuit itself observed that with respect to treaties, "great difficulty may arise in ascertaining where that line [between the judiciary and other branches] is drawn and when it has been crossed." (JA208, 690 F.2d at 311). While the Second Circuit is undoubtedly correct that under certain circumstances the proper placement of the dividing line between the branches may be extraordinarily difficult, such circumstances are not present here. Had the Second Circuit considered all of the well-settled principles concerning treaty interpretation and construction, rather than several isolated rules, it is submitted that it would have arrived at precisely the conclusion reached by the district court: that the Warsaw limitation of liability provisions must be enforced and that the most appropriate conversion factor for those provisions is the last official price of gold.

Instead, the Second Circuit considered only two constitutional principles: (i) that Article II, Section 2, Clause 2 of the Constitution places treaty proposal in the Executive and ratification in the United States Senate (JA207, 690 F.2d at 311); and (ii) that "it is not the province of courts to declare treaties abrogated" (JA208 n.26, 690 F.2d at 311 n.26). Having thus

correctly concluded that the power to abrogate a treaty resides in the coordinate branches of the government, the court of appeals proceeded to incorrectly conclude that Congress' repeal of the Par Value Modification Act,[22] which set the official price for gold, abrogated the limitation of liability provisions of the Warsaw Convention.

In so holding, the Second Circuit totally ignored the well-settled, and clearly controlling, principle that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933). *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *United States v. Lee Yen Tai*, 185 U.S. 213, 221-22 (1902). Had the Second Circuit not ignored this primary and long-standing principle, and its corollary that legislative silence is never sufficient to abrogate a treaty (*Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)), its very own findings would have precluded a determination that the limitation of liability provisions had been abrogated. As the Second Circuit itself observed, "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification] Act." (JA208, 690 F.2d at 311).

In fact, far from reflecting a clear congressional intent to either abandon the last official price of gold as the Warsaw medium of conversion or to abrogate the treaty, the 1976 Repeal Act and its legislative history make no reference whatsoever to the Warsaw Convention. The repeal was completely unrelated to the Convention and, as the Senate commented,

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22 Par Value Modification Act of 1972, Pub. L. No. 92-268, 86 Stat. 116, *amended by* Par Value Modification Act of 1973, Pub. L. No. 93-110, 87 Stat. 352, 31 U.S.C. § 449 (1976), *repealed by* Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660, 2661 (the "1976 Repeal Act"). The 1976 Repeal Act did not become effective until April 1, 1978.

nothing more than a "series of technical amendments" designed to reflect changes in the international monetary system. Senate Comm. on Foreign Relations, Bretton Woods Agreements Act, S. Rep. No. 1148, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5943.

If anything, contrary to the Second Circuit's conclusion, the legislative history of the 1976 Repeal Act contemplates a continued role for the last official price of gold, particularly in the international arena. As the Senate Committee on Foreign Relations noted:

> While it is the expressed intent of the IMF to move gold out of the international monetary system, there are vast numbers of legal and psychological mechanisms still in evidence in the system that will perpetuate some role for gold. (Senate Comm. on Foreign Relations, Bretton Woods Agreements Act, S. Rep. No. 1148, 94th Cong., 2d Sess. 12-13 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5947).

Among the mechanisms employing the last official price of gold which are still very much in place are the conversion factors for the value of the Treasury Department's gold reserves[23] and the value of the United States' subscription obligations to the capital stock of the International Bank for Reconstruction and Development (the "World Bank"), the Inter-American Development Bank (the "IADB"), the International Development Association (the "IDA") and the Asian Development Bank (the "ADB").[24] Thus, the court of appeals

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23 *See* Division of Government Accounts & Reports, U.S. Dep't of the Treasury, Status Report of U.S. Government-Owned Gold (Apr. 30, 1983), which is reprinted in the Appendix to this brief (hereinafter referred to as "BA") at BA41.

24 The World Bank, the IADB and the ADB have, for internal purposes, authorized the computation of the value of their capital stock in terms of SDRs; however, their separate articles of Agreement provide for the calculation of member nations' contributions based upon the last official price of gold. Articles of Agreement of the International Bank

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was clearly incorrect in suggesting that "[t]he sole remaining use of the last official price is in determining the value of gold held in the form of gold certificates." (JA204 n.20, 690 F.2d at 309 n.20).

Moreover, Congress' silence with respect to the continued viability of the Warsaw limitation provisions at the time it repealed the Par Value Modification Act affirmatively supports the conclusion that Congress intended to leave the Warsaw limitation provisions unaffected. It must surely be assumed that Congress was aware of the requirement, under Article 39(2) of the Convention, that a signatory desiring to withdraw from the Convention must provide its treaty partners with six

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for Reconstruction and Development, *opened for signature* Dec. 27, 1945, art. II § 2(a), 60 Stat. 1440, 1441, T.I.A.S. No. 1502, 2 U.N.T.S. 134, 136; Agreement Establishing the Inter-American Development Bank, *done* Apr. 8, 1959, art. II § 2(a), 10 U.S.T. 3029, 3073, T.I.A.S. No. 4397, 389 U.N.T.S. 69, 76; Articles of Agreement of the International Development Association, *done* Jan. 26, 1960, art. II § 2(b), 11 U.S.T. 2284, 2286, T.I.A.S. No. 4607, 439 U.N.T.S. 249, 254; Agreement Establishing the Asian Development Bank, *done* Dec. 4, 1965, ch. II, art. 4 § 1, 17 U.S.T. 1418, 1422, T.I.A.S. No. 6103, 571 U.N.T.S. 123, 138. Congress continues to appropriate funds for United States payments to these institutions based upon the last official price of gold. Omnibus Budget Reconciliation Act of 1981, Title XIII, Pub. L. No. 97-35, §§ 1311 (World Bank), 1321 (IDA), 1351(a) (IADB), 1352(a) (ADB), 95 Stat. 739, 740-41, 744, codified at 22 U.S.C. §§ 286e-1h, 284o, 283z-2, 285w (Supp. V 1981).

As has been observed with respect to the World Bank:

> Since April 1, 1978, . . . currencies no longer have par values in terms of gold and the preexisting basis for translating the 1944 dollar into members' currencies has ceased to exist. . . . Since April 1, 1978, the Bank has expressed the value of its capital stock on the basis of the SDR for purposes of its financial statements. *The Bank has continued and will continue to accept capital subscriptions at 1.20635 current U.S. dollars to one 1944 dollar, the value of the 1944 dollar at the last par value of the U.S. dollar* . . . . (National Advisory Council on International Monetary and Financial Policies, Special Report to the President and to the Congress on the General Capital Increase of the International Bank for Reconstruction and Development, Attachment 1, at 2-3 (May 1981) (unpublished report) (emphasis added)).

months' notice of its intended withdrawal and that Congress would not knowingly ignore this express treaty obligation of the United States. *See The Federalist* No. 64, at 424 (J. Jay) (B. Wright ed. 1961). And, when the Article 39(2) requirement is considered in conjunction with the rule that Congressional silence in the face of an established practice, such as the use of the last official price of gold as the Warsaw conversion factor, may be treated as consent (*Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)), that silence becomes conclusive.

In addition, since the Warsaw Convention is a self-executing treaty which required no enabling legislation to effectuate it in the United States (*Indemnity Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944); *Garcia v. Pan American Airways, Inc.*, 269 A.D. 287, 292, 55 N.Y.S.2d 317, 322 (2d Dep't 1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946)), it is submitted that Congress could not have abrogated the Warsaw limitation provisions simply by repealing the Par Value Modification Act even had it desired to do so. The Par Value Modification Act has always been totally unrelated to the effectiveness of the Warsaw Convention and therefore its repeal is necessarily irrelevant to that treaty's continued viability. Since only an unambiguous legislative act can repeal or abrogate a treaty, the repeal of a statute unrelated to the effectiveness of a treaty can hardly result in its abolition. If this were not the case, treaties to which the United States has adhered would be subject to inadvertent abolition, a circumstance which would obviously not be in the best interests of the United States.

Yet further evidence of the Second Circuit's error is the fact that the Executive, the governmental branch directly charged with the conduct of foreign affairs, has found the court of appeals' decision to be inimical to the conduct of United States' foreign policy. Thus, the United States has stated with respect to the Second Circuit's opinion:

> This decision, if allowed to stand, will have significant adverse consequences for the United States both in its

immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally.[25] (United States Brief in support of TWA's Petition for Certiorari at 2).

In short, the absence of any legislative intent to abrogate the limitation of liability provisions in either the legislation repealing the Par Value Modification Act or in any other act of Congress, when coupled with the Executive's position that those provisions should continue to be interpreted as they have been in the past, necessarily leads to the conclusion that the Second Circuit's decision declaring the treaty unenforceable must be set aside. The correctness of this conclusion is confirmed by both the reality, noted by Benjamin Franklin long ago, that "[i]f we do not convince the world, that we are a Nation to be depended on for fidelity in Treaties; . . . our reputation, and all the strength it is capable of procuring, will be lost"[26] and the resulting rule of law that " '[t]he interpretation, therefore, . . . which would render a treaty null and inefficient cannot be admitted; . . . it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory.' " *Geofroy v. Riggs*, 133 U.S. 258, 270 (1890) (quoting E. de Vattel, 2 *Droit des Gens* 265 (Pradier-Fodéré ed. Paris 1863)).

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25 The United States brief also points out that the Second Circuit's opinion has already served to irritate the international community. The Government has noted that "several foreign governments have expressed their view that the court of appeals' decision will seriously affect United States relations in international aviation." (United States Brief in support of TWA's Petition for Certiorari at 2-3).

Such expressions of disapproval by foreign governments are not surprising since no other signatory State has rejected the Convention's limitation of liability provisions. In view of that fact, the Second Circuit clearly overemphasized what it regarded as "international disarray" with respect to the conversion issue. (JA203-04, 690 F.2d at 309). The primary teaching of the various foreign cases and materials is that unless the Warsaw limitation is enforced, the expectations of the Convention's signatories will be totally defeated.

26 Letter from Benjamin Franklin to Charles Thomson (May 13, 1784), 9 *The Writings of Benjamin Franklin* 212, 213 (A. Smyth ed. 1907).

Since the Warsaw Convention has not been abrogated by Congress and cannot be abrogated by the courts, the judiciary is duty bound to interpret the Convention in a manner which will lead to its enforcement and to "administer it according to its terms." *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1854).[27] In carrying out that duty, the guiding principle and primary goal is to give the treaty "a fair interpretation, according to the intention of the contracting parties, . . . so as to carry out their manifest purpose." *Wright v. Henkel*, 190 U.S. 40, 57 (1903). *See, e.g., Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902). Moreover, a change in circumstances, such as gold's metamorphosis into a volatile commodity, does not relieve the courts of their obligation to effectuate the intentions of the treaty's framers as effectively as possible in view of the unforeseen events. *See Pigeon River Improvement Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138

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27 Of course, as *Braden* observes, a treaty need not be enforced if it conflicts with the Constitution of the United States. 57 U.S. (16 How.) at 657. Although there have been several constitutional challenges to the Warsaw limitation provisions, none has ultimately succeeded. *See, e.g., In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982); *McCarthy v. East African Airways Corp.*, 13 Av. Cas. (CCH) 17,385, 17,386 (S.D.N.Y. 1974); *Pierre v. Eastern Air Lines, Inc.*, 152 F. Supp. 486, 489 (D.N.J. 1957); *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. at 340. *See also Burdell v. Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968), *opinion withdrawn*, 11 Av. Cas. (CCH) 17,351 (Ill. Cir. Ct. 1969), in which an Illinois trial court initially found the Convention unconstitutional, but subsequently withdrew its opinion on the ground that it was unnecessary to reach the question of constitutionality. Indeed, in considering the constitutionality of another limitation statute—the Price-Anderson Act, relating to the nuclear energy industry—this Court recently cited the *Pan American* case with approval and noted that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978).

(1934). As this Court has recently observed, the judiciary's constitutionally mandated role with respect to treaties "is limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

When the foregoing principles of treaty interpretation are applied to the facts at bar, the last official price of gold clearly emerges as the appropriate Warsaw conversion factor.[28] Article 22 of the Warsaw Convention provides in relevant part as follows:

> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram . . . .
>
> . . . .
>
> (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Thus, under Article 22, the maximum extent of a carrier's liability is expressed for conversion purposes in terms of a

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28 Significantly, numerous foreign decisions have reached precisely this conclusion, finding the last official price of gold to be the appropriate conversion factor. *See, e.g., Costell v. Iberia, Lineas Aèreas de España, S.A.*, No. 255 (Court of Appeal of Valencia, Spain Oct. 16, 1981) (an English translation is set forth at BA6); *Pakistan International Airlines v. Compagnie Air Inter S.A.*, No. 79/2278 (Court of Appeal of Aix-en-Provence, France Oct. 30, 1980) (an English translation is set forth at JA133); *Hornlinie A.G. v. Société Nationale Pètrole Aquitaine*, 1972 Nederlandse Jurisprudentie No. 269, at 728 (Supreme Court of The Netherlands Apr. 14, 1972), *reprinted in* 7 Eur. Trans. L. 933 (1972) (an English translation is set forth at JA114). *See also Companhia de Seguros Maritimos v. Varig* (Federal Court of Appeals, Brazil June 3, 1975), and *Association Aèronautique v. Thièrache* (Trib. gr. inst., Paris, France Feb. 10, 1973), *original text reprinted in* [1973] 27 Revue Française de Droit Aérien 212, which are discussed in C. Shawcross & M. Beaumont, *Air Law* § 452A, at 142 (4th ed. 1977 "Noter-up" Issue 10 1982). Since the decisions of "our sister signatories [are] entitled to considerable weight" (*Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)), these cases are of particular importance.

specified weight of gold. As demonstrated above (*see supra* pp. 5-8), gold was selected in 1929 because it was the then existing international unit of account which would provide stable and predictable limits of liability, and for many years gold served its Warsaw purpose admirably. (JA24; *see* graph at JA30). However, since 1978, gold has no longer been an international unit of account but only

> a volatile commodity, not related to a price index, or to the rate of inflation, or indeed to any meaningful economic measure, other than the views of whoever made up the market about all of the terrible things going on in the unpredictable world. (A. Lowenfeld, *Aviation Law* § 6.51, at 7-169 (2d. ed. 1981))

As a result of this change in the nature of the international use of gold, basing the Warsaw limitation on the market price of gold would lead to a widely fluctuating limit of liability which would vary substantially from week to week or even day to day.[29] For example, during the short interval between January 5, 1981 and January 29, 1981, the market price of gold fell from approximately $600 to $493.75 per ounce (JA24), a fluctuation of 18 percent.[30] Consequently, employing the market price of gold as a conversion factor would totally undermine the stable and foreseeable limits of liability which the drafters of the Convention sought to achieve. *See supra* pp. 5-8.

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29 As a general rule, the conversion of foreign currency into a United States judgment is calculated as of the date of judgment. *See Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 519 (1926). However, it should be noted that, at least in New York, state courts have also used the date on which the cause of action arose in making such conversions. *See Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 39, 138 N.E. 497, 498 (1923).

30 Other illustrations of the volatile nature of the market price of gold abound: the price of gold fell from approximately $850 per ounce in January 1980 to approximately $490 per ounce in April of that year and then rose again to approximately $700 per ounce in September 1980. (JA24). The wide fluctuations of the market price of gold over a one-year period are graphically depicted at JA29.

This conclusion has been concurred in by the district court in the instant case and in recent decisions of various federal and state courts. *See, e.g., Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 232 (N.D. Ill. 1983); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983), *petition for cert. docketed*, No. 83-5 (July 11, 1983) (the "*Polish Case*"); *Deere & Co. v. Deutsche Lufthansa A.G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982); *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982).[31] For example, in the *Polish Case*, the district court, undoubtedly mindful of this Court's admonition that the touchstone of treaty interpretation is to effectuate the treaty's purposes (*Wright v. Henkel*, 190 U.S. at 57; *Bacardi Corp. v. Domenech*, 311 U.S. at 163), held:

> The signatories of the treaties looked to gold to avoid fluctuations in the limitations, since gold had a constant value and the currencies of the various nations were subject to unilateral alterations for reasons wholly unrelated to air carriers' liability. This constancy and stability, upon which the parties to the treaties relied, cannot be achieved if the fair market value of gold is used for the calculations. To substitute the fluctuating price of the commodity gold for the relatively fixed and certain price of an international monetary unit does, as defendant suggests, directly contravene the intentions of all those who adopted the treaties. For this reason, such a substitution is clearly inappropriate, and plaintiffs' suggestion that the fair market value of gold be the basis for the conversion must be rejected. (*Polish Case*, 535 F. Supp. at 842-43) (footnote omitted).[32]

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31 The opinions in *Deere* and *Electronic Memories* are set forth in the Appendix to TWA's petition for certiorari at A-61 and A-60, respectively.

32 Numerous experts in both aviation law and the international monetary system, as well as the leading international aviation organization

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Since it is clear that deference to the intentions of the framers of Article 22 requires the rejection of the widely fluctuating market price of gold as a medium of conversion, another medium, which will effectuate those intentions, must necessarily be applied.

In light of the fundamental tenets of treaty construction, set forth above, including the rule that treaties must be construed "to give a sensible meaning to all their provisions" (*Geofroy v. Riggs*, 133 U.S. at 270), it is respectfully submitted that the district court was entirely correct in holding that conversion of the Warsaw gold provisions "should be premised on the last official price of gold in the United States." (JA189, 525 F. Supp. at 1289). Indeed, when all of the legal and factual

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affiliated with the United Nations, are in complete agreement with the *Polish Case*'s condemnation of the use of the market price of gold. *See, e.g.*, G. Miller, *Liability in International Air Transport* 178-80 (1977); Legal Committee of the International Civil Aviation Organization (the "ICAO"), Resolution Concerning the Conversion of Poincaré Francs to National Currencies in the Warsaw and Rome Conventions, 21st Sess., Minutes 84, ICAO Doc. 9131-LC/173-1, at 2 (1974) (the full text of the ICAO resolution is set forth at JA58).

There is presently scant support in the international community for the use of the market price. With one exception, all of the foreign cases employing the market price of gold as the conversion factor, upon which Franklin Mint relied in the court below, predate the dramatic fluctuations in the market price of gold which began in 1979. *See, e.g.*, *Kuwait Airways Corp. v. Sanghi*, No. 54/77 (Court of the Principal Civil Judge, Civil Station Bangalore, India Aug. 11, 1978) (JA179); *Balkan Bulgarian Airlines v. Tammaro* (Court of Milan, Italy Oct. 25, 1976) (JA176); *Florencia, Cia. Argentina de Seguros S.A. v. Varig S.A.* (Federal Civil & Commercial Court, Buenos Aires, Argentina Aug. 27, 1976), *original text reprinted in* 1977 Uniform L. Rev. 198 (JA169); *Zakoupolos v. Olympic Airways Corp.*, No. 256/74 (Court of Appeal, 3d Dep't, Athens, Greece Jan. 10, 1974) (JA165). The one foreign case upon which Franklin Mint relied, which was decided after that date, *Cosida S.p.A. di Assicurazioni e Riassicurazioni v. B.E.A.*, No. 2796/77 (Milan Court of Appeal, Italy, Judgment No. 861 June 9, 1981), has been overruled by statute. *See* Law No. 84 of March 26, 1983, 90 Gazetta Ufficiale della Republica Italiana (Apr. 1, 1983) (BA37), pursuant to which Italy adopted SDRs as the Warsaw conversion factor.

aspects of the question are considered, it is undeniable that—in the words of the *Polish Case*—the use of the last official price of gold makes "the most sense." (*Polish Case*, 535 F. Supp. at 842).

A conversion predicated on the last official price clearly results in a stable and predictable limit of liability which completely conforms to the purposes envisioned by the framers of Article 22. As the district court obviously recognized and the *Polish Case* court explicitly held:

> The clear merit of using this price as the unit for conversion is that the price constitutes a conversion factor established by precisely the kind of mechanism that the Convention's drafters contemplated when the applicable clauses were drafted. (*Polish Case*, 535 F. Supp. at 843).

Significantly, at least two Federal district courts which have considered the question subsequent to the Second Circuit's decision herein, have rejected that decision and have employed the last official price of gold as the conversion factor. *See Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. at 239; *Deere & Co. v. Deutsche Lufthansa A.G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982).[33]

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33 One United States District Court has adopted the Second Circuit's *Franklin Mint* reasoning as well as its decision. However, that court did not limit its ruling to prospective application. *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal. 1983), *interlocutory review denied*, No. 83-8051 (9th Cir. May 10, 1983). *Kimpo* appears to be the only court decision, in any country, which follows *Franklin Mint* and abrogates the limitation of liability provisions. The fact that no foreign court has taken this step is of particular importance since, as Lord Denning, M.R., observed with respect to the Warsaw Convention in *Corocraft Ltd. v. Pan American Airways Inc.*, [1969] 1 Q.B. 616, 655 (1968): "The courts of all the countries should interpret this Convention in the same way."

In addition, one district court has found the market price of gold to be the appropriate conversion factor. *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D.

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As the *Maschinenfabrik* court held:

> To conclude as the Second Circuit did in *Franklin Mint* that the action of Congress in eliminating an official price of gold should operate to eliminate all limitations of liability found in the Warsaw Convention reads too much into an unrelated act of Congress. That act was intended to deal with various monetary matters and only incidentally affected the provisions of the Warsaw treaty. There is no reason to believe that Congress intended to declare Article 22 obsolete.
>
> Rather, this Court believes it should enforce . . . the last official price of gold in the United States as the basis for conversion and liability limitation. (562 F. Supp. at 239).[34]

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Tex. 1981), *appeal docketed*, No. 81-2519 (5th Cir. Dec. 30, 1981). Not surprisingly, *Boehringer* has been severely criticized:

> [*Boehringer*] concluded that the proper basis for determining the liability limitation is with reference to the free market price of gold. . . . It did so in spite of its findings that the drafters of the Warsaw Convention used gold as the unit of reference because of its stability and that "to the present day . . . the free-market price of gold has risen to more than $400 an ounce . . . ." I must respectfully disagree with the Texas court's conclusion . . . . (*Polish Case*, 535 F. Supp. at 843 n.8).

Boehringer is presently on appeal to the United States Court of Appeals for the Fifth Circuit, and has been argued on the merits. However, the Fifth Circuit has indicated that it will withhold its decision pending this Court's determination herein. *See* Letter from Chief Deputy Clerk, Fifth Circuit, to counsel (March 4, 1983).

34 Although not explicitly stated, it can be assumed that the district courts which have rejected the Second Circuit's decision were concerned with the possibility that if the United States were the only Warsaw signatory imposing no limit of liability, substantial forum shopping and additional overcrowding of the already overburdened federal courts could result. Thus, those district courts apparently hoped to avoid the extraordinary increase in litigation which has already taken place in maritime cargo cases—*e.g.*, thirty percent of the present civil docket of the Southern District of New York (*see A*

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Additionally, as the district court observed, the use of the last official price of gold is also mandated by CAB Order 74-1-16. That Order requires United States airlines to file tariffs advising the public that the limit of liability of 250 francs per kilogram for checked baggage and goods is $20.00 or stated on a per pound basis is $9.07. (JA57). This limitation is calculated on a gold value of $42.22 per ounce, the last official price of gold in the United States.

Although the Second Circuit has suggested that "[t]he sole criterion supporting the CAB's position appears to be the law of inertia" (JA205, 690 F.2d at 310), the fact remains that in the absence of any countervailing official guidance, the entire United States airline industry is required to conform its conduct to Order 74-1-16 and has consistently done so. The CAB is aware of this industry-wide practice and has obviously not objected to compliance with its own Order.[35]

Contrary to the Second Circuit's assertion that CAB Order 74-1-16 continues to exist solely by virtue of "inertia," affirmative policy reasons have led to the continued existence of Order 74-1-16:

> This approach produces the greatest degree of stability possible . . . .

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Proposal for a Pilot Program Concerning Cargo Damage Cases, 37 Rec. A.B. City N.Y. 103, at 103 (1982))—which in large measure has arisen from the fact that the Carriage of Goods by Sea Act of 1936, § 4(5), 46 U.S.C. § 1304(5) (1976), provides for a higher limit of liability than the related Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, *opened for signature* Aug. 25, 1924, art. 4, § 5, 51 Stat. 233, 252, T.S. No. 931, 120 L.N.T.S. 155, 167, as interpreted by the English Courts. *See* Asser, *supra* note 11, at 648.

35 As a consequence of this CAB mandated industry-wide practice, of which Franklin Mint as an experienced shipper was undoubtedly aware, the district court found that the parties had intended "to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case." (JA188-89, 525 F. Supp. at 1289).

> We believe that the Board's current course of action [employing the last official price of gold] is superior to any of the alternatives currently available. (Golden Memorandum, *supra* p. 5, at JA40).[36]

In view of the blackletter law that an agency regulation must be affirmed unless it is arbitrary, capricious, or an abuse of discretion (*see* Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1976)); that agency action is entitled to a presumption of validity (*see, e.g., Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968); *Ethyl Corp. v. Environmental Protection Agency,* 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied,* 426 U.S. 941 (1976)); and that "a reviewing court . . . 'is not empowered to substitute its judgment for that of the agency' " (*Federal Communications Commission v. WNCN Listeners Guild,* 450 U.S. 582, 594 n.30 (1981)), particularly with respect to the enforcement of existing treaty provisions (*Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. at 184-85; *Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961)), it is submitted that the district court's reliance upon CAB Order 74-1-16 was entirely justified. Even absent the other bases of its holding, that Order alone would have been more than adequate support for the district court's decision.

In sum, the use of the last official price of gold as a conversion factor is totally consistent with the objectives and purposes of Article 22; with the only presently effective CAB regulation dealing with this issue; and with the overwhelming weight of authority in both the United States and other signatory jurisdictions. It should therefore be adopted as the Warsaw conversion factor.

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36 The CAB has effectively endorsed the Golden Memorandum and the continued use of the last official price of gold as a conversion medium. This is so because all United States air carriers are required to file their international tariffs with the CAB (*see* Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1976)), and they have continued to file using the last official price of gold. "Moreover, the Board's interpretation is consistent with the industry's own understanding" of the Convention, a fact which further supports the CAB's position. *British Caledonian Airways, Ltd. v. Civil Aeronautics Board,* 584 F.2d 982, 996 (D.C. Cir. 1978).

POINT II

SPECIAL DRAWING RIGHTS ARE AN ALTERNATIVE CONVERSION FACTOR

Although the district court found the last official price of gold to be the most appropriate conversion factor for the Article 22 gold provisions, it noted that were it "writing on a clean slate," it would have found the arguments in favor of employing SDRs to be "most persuasive." (JA188, 525 F. Supp. at 1289).

As indicated above and amplified by the record, SDRs are a stable international unit of account which were clearly intended to replace gold as an international reference value in the world economy. (JA21-22). In fact, SDRs are frequently referred to as "paper gold." P. Samuelson, *Economics*, *supra* p. 10, at 612. Therefore, their use as a medium of conversion under Article 22 would result in predictable and stable limits of liability which would fully effectuate the Convention's purposes.

SDRs were adopted in the Montreal Protocols at the suggestion of the United States. *See* A. Lowenfeld, *Aviation Law* § 6.51, at 7-171 (2d ed. 1981). Consequently, it would clearly be appropriate to implement their use via judicial determination, since "[t]he conduct of the parties subsequent to ratification of a treaty may . . . be relevant in ascertaining the proper construction to accord the treaty's various provisions." *Day v. Trans World Airlines, Inc.*, 528 F.2d at 35. *See Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 158 (1934).[37]

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37 Article 18 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *reprinted in* 8 Int'l Legal Materials 679, 686 (1969), also supports the use of SDRs. Under that Article, by signing the Montreal Protocols the United States placed itself under an obligation to avoid undermining them during the ratification process. *See generally, United States v. D'Auterive*, 51 U.S. 609, 623 (1850). As discussed above, *see supra* p. 11, while the Protocols did not receive

(footnote continued on following page)

Moreover, although ignored by the Second Circuit, the very statute which repealed the Par Value Modification Act accepted SDRs as a unit of account for determining the United States' obligations as a member of the IMF (Second Amendment to the IMF Articles of Agreement, *supra* p. 9, art. IV, § 2(b), 29 U.S.T. at 2208-09, T.I.A.S. No. 8937) with the objective of making the SDR "the principal reserve asset in the international monetary system" (Second Amendment to the IMF Articles of Agreement, *supra* p. 9, art. VIII, § 7, 29 U.S.T. at 2226, T.I.A.S. No. 8937). Thus, if, as the court of appeals suggested, the 1976 Repeal Act is accepted as having terminated the use of the last official price of gold as the Warsaw conversion factor, it necessarily follows that Congress must have intended to substitute SDRs in its place.

The propriety of selecting SDRs as the conversion factor is supported by numerous reasons:

> the ease with which the SDR can be adopted by interpretation or administrative decision, the adoption of the SDR under treaties that deal with a similar subject matter, the desirability of a unit of account that will ensure equal

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(footnote continued from previous page)

the necessary two-thirds majority in the Senate in March 1983, they are being reconsidered and are still supported by the Administration. 129 Cong. Rec. S2279 (daily ed. Mar. 8, 1983).

Although the Vienna Convention has not been ratified by the United States, it is "generally recognized as the authoritative guide to current treaty law and practice" (Letter of Submittal from Secretary of State William P. Rogers to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (Oct. 18, 1971) (submitting the Vienna Convention)). As such, it has been relied upon by United States courts. *See, e.g., Weinberger v. Rossi*, 456 U.S. at 29 n.5; *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702, 707 n.6 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

Use of the last official price of gold as the Warsaw conversion factor would be as fully consistent with the Vienna Convention as use of SDRs, since the last official price achieves the predictable and stable limits of liability sought by the Montreal Protocols.

> value wherever a recovery of damages pursuant to the treaty is sought and whatever the currency in which damages are awarded, [and] the publication by the [IMF] of exchange rates in terms of the SDR and the difficulty or cost of establishing a substitute procedure. (J. Gold, *Floating Currencies, SDRs, and Gold*, IMF Pamphlet Series No. 22, at 65 (1977)).[38]

Thus, SDRs would fully comply with the intent of the framers of Article 22 since they would result in a stable and predictable limitation of liability. In fact, it was just such reasoning which led the highest foreign court to directly confront the issue to select SDRs.

In *State of The Netherlands v. Giants Shipping Corp.*, Rechtspraak van de Week 321 (May 30, 1981) (Supreme Court of The Netherlands May 1, 1981) (JA72) (hereinafter "*Giants Shipping*"), the Supreme Court of The Netherlands, that nation's highest tribunal, was faced with precisely the issue before this Court: how to convert the gold value provisions of a multilateral treaty's limitation of liability clause into national currency, in view of gold's changing role in the world

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38 SDRs have been adopted as the basis for converting Warsaw gold francs into national currencies by legislation or administrative acts in a number of foreign countries, including Canada (Currency and Exchange Act: Carriage By Air Act Gold Franc Conversion Regulations, Jan. 13, 1983, 117 Can. Gaz., pt. II, No. 2, at 431 (Jan. 26, 1983)) (BA36); Italy (Law No. 84 of March 26, 1983, 90 Gazetta Ufficiale della Republica Italiana (Apr. 1, 1983)) (BA37); the Republic of South Africa (Carriage by Air Act, No. 17 of 1946, § 3(7), *as amended by* No. 5 of 1964 *and* No. 81 of 1979, Stat. S. Afr. (Issue No. 13) 15, *implemented by* Dep't of Transport Notice R2031 (Sept. 14, 1979)) (BA39); Sweden (Carrier by Air Act (1957: 297), ch. 9, § 22, (*as amended* Mar. 30, 1978)) (JA67); and the United Kingdom (Stat. Inst. 1980 No. 281) (JA70).

It is noteworthy that the applicable Swedish legislation nullified an earlier decision by a Swedish court in *Saga v. Sagoland* (Lower Court, Göteborg, Sweden Oct. 2, 1973), *discussed in* [1975] 29 Revue Française de Droit Aérien 138, which applied the market price of gold, and that the applicable Italian legislation codified a ruling of the Rome Civil Court in *Linee Aeree Italiane v. Riccioli*, No. 609/79 (Nov. 14, 1978) (JA97).

economy.[39] In answering that question, the court noted that "[t]he point of departure should be the preference—underlying the Treaty. . . .—for a standard which is current in the international monetary field for determining the internationally uniform limits of liability intended by the Treaty." (*Giants Shipping, supra* p. 32, at JA92-93). Finding that the market price of gold "would be contrary to this point of departure" (JA93) because "gold has lost all monetary significance" (JA92), the court instead chose SDRs, notwithstanding the fact that an amendment to the treaty, substituting SDRs for French gold francs, was not yet in force. The rationale for the court's decision was the fact that SDRs had replaced gold as the unit of account in the international monetary system and that, therefore, their use was in harmony with "the adjustment of international treaties and national laws to the changed monetary situation." (*Giants Shipping, supra* p. 32, at JA93-94).

In making the actual conversion from gold francs to SDRs, the *Giants Shipping* court performed a simple calculation. Using the gold value of SDRs as of April 1, 1978, the date on which the IMF method of valuing SDRs was severed from gold, the court concluded that 15 French gold francs had the same value as 1 SDR. Therefore, by dividing the number of French gold francs called for by the limitation provisions of the Convention by 15, it reached the proper number of SDRs. Once the number of SDRs was obtained, the limit of liability

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39 In *Giants Shipping*, the court construed a limitation of liability provision set forth in the Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, *done* at Brussels Oct. 10, 1957 (the "Brussels Convention"), *reprinted in* 6 *Benedict on Admiralty* 5-11 (7th ed. 1983). The Brussels Convention is strikingly similar to the Warsaw Convention in many respects: the limitation of liability provisions of each Convention contain gold clauses expressed in French gold francs; among the fundamental purposes of both Conventions was the desire to create uniform rules governing the liability of carriers engaged in international transportation; and the signatories of each Convention had agreed to amendments adopting SDRs in place of gold, although neither amendment was yet in force.

was converted into local currency on the date of payment simply by referring to the Guilder/SDR exchange rate posted by the IMF.

In addition to the Supreme Court of the Netherlands, the courts of several other Warsaw signatory States have employed SDRs.[40] *See, e.g., Linee Aeree Italiane v. Riccioli*, No. 609/79 (Rome Civil Court, Italy Nov. 14, 1978) (JA102);[41] *Kislinger v. Austrian Airtransport*, No. 1 R 145/83 (Commercial Court of Appeals of Vienna, Austria June 21, 1983) (BA20); *Rendez-vous-Boutique-Parfumerie Friedrich und Albine Breitinger GmbH v. Austrian Airlines*, No. 14 R 11/83 (Court of Appeals of Linz, Austria June 17, 1983) (BA25, 30).

In short, the Warsaw gold provisions can easily be converted into U.S. (or any other) currency via SDRs. On March 31, 1978, SDRs were valued in terms of gold and were therefore easily convertible into gold francs. On April 1, 1978, the IMF member nations severed the link between gold and the SDR, as well as between gold and their national currencies, and SDRs were valued according to a weighted basket of national currencies. Although the value of the SDR has varied somewhat with change in the value of the basket of currencies, on one day, April 1, 1978, the basket value of the SDR was precisely the

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40 The only other Supreme Court of a signatory State to consider the Warsaw conversion issue, the Cour de Cassation of France, has held that the limitation must be enforced and that the conversion factor to be applied should be that which is considered correct by the executive branch of the French government. In so holding, the Court remanded the case to the Court of Appeals of Paris, which had applied the modern French franc as the conversion factor, for further proceedings not inconsistent with its opinion. *Chamie v. Egyptair*, No. 80-12.428 (Cass. civ. com., France Mar. 7, 1983) (BA2).

41 Prior to rendering its decision, the *Riccioli* court sought advice concerning the proper basis for conversion from an official of the Italian Central Exchange Control Board with expertise in the field of international monetary affairs. (An English translation of that official's technical report is set forth at JA106). As noted above, *see supra* p. 32 n. 38, subsequent to the *Riccioli* decision, Italy adopted SDRs as the conversion factor by legislation.

same as its gold value had been the day before. As a result, the SDR, having both a gold value and a modern currency value, may be employed as a Rosetta stone to translate the Warsaw gold provisions into current U.S. dollars with an unbroken line of value from gold to SDRs to national currencies.[42]

Notwithstanding the foregoing arguments, the Second Circuit rejected SDRs as a conversion factor primarily because they are "a creature of an international body, the IMF" (JA207, 690 F.2d at 310), and because their value can change "at the whim of an international body distinct from the parties to the Convention." (JA207, 690 F.2d at 311). It is submitted that those reasons are parochial and entirely without merit.

The Second Circuit failed to pay due consideration to the fact that the United States ratified the multilateral treaty creating the IMF (*see supra* p. 8 n.15); took the lead in suggesting the adoption of SDRs as the Montreal Protocols'

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42 The mathematical computation converting French gold francs into U.S. dollars would be as follows. The value of the SDR on March 23, 1979, the date the cargo was delivered to TWA, has been used for illustrative purposes.

1 Poincaré franc (90% fine gold)		=	0.0655 gram of fine gold
1 Poincaré franc (100% fine gold)		=	0.05895 gram of fine gold
1 SDR (gold value on March 31, 1978)		=	0.888671 gram of fine gold
The number of francs in one SDR	= 0.888671 / 0.05895	=	15.075 rounded to 15
The Warsaw limit of 250 francs per kilogram converted to SDRs	250 / 15	=	16.67 SDRs per kilogram, rounded to 17 SDRs
Dollar value of 1 SDR on March 23, 1979		=	1.28626
17 SDRs per kilogram × 1.28626		=	$21.87 per kilogram.

unit of conversion (*see supra* p. 11); and has accepted SDRs as the international unit of account vis-à-vis the IMF Treaty as amended (*see supra* p. 31). Moreover, a seventy percent majority of the total voting power of the 146 member nations is necessary to make even a technical change to the valuation of the SDR and an eighty-five percent majority is necessary to make a fundamental change in valuation. Second Amendment to the IMF Articles of Agreement, *supra* p. 9, art. XV, § 2, 29 U.S.T. at 2238, T.I.A.S. No. 8937. Thus, while SDRs may be a "creature of an international body," they are also a "creature" of the United States and can hardly be revalued upon a "whim."

The Second Circuit's additional reasons for rejecting SDRs are equally unavailing. (JA206-07, 690 F.2d at 310). While the Second Circuit is correct that SDRs are not mentioned in the Convention, that fact alone is insufficient to prevent their use as a conversion factor since SDRs, as the modern day international unit of account, totally fulfill the intent of the treaty's drafters. In the words of Mr. Justice Holmes concerning Constitutional construction, which are equally applicable to treaty interpretation:

> [W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. (*Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

Therefore, the language of a treaty should never be permitted to become a "verbal prison" (*Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966)); nor should a change in circumstances be permitted to defeat the treaty's original purposes "even if this requires departing in some measure from the letter [of the treaty provision] and reading the language in a practical rather than literal fashion" (*Eck v. United Arab Airlines, Inc.*, 360 F.2d at 812). *See Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1261 n.10 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977); J. Sutherland, *Statutes and*

Statutory Construction § 32.09, at 383 (4th ed. 1972). As a result, the mere fact that SDRs are not mentioned in the Convention is insufficient to preclude their use as the conversion factor.

The Second Circuit's suggestion that had it employed SDRs it would have had to select, as a policy matter, the actual limitation is simply wrong. Far from having to set the limit, a United States court could employ SDRs as the conversion factor following the *Giants Shipping* method. As discussed above, that method relies upon the gold value of SDRs on April 1, 1978 and, therefore, is directly tied to the Warsaw gold provisions.

Finally, the Second Circuit's observation that the Senate has thus far declined to ratify the Montreal Protocols (JA206, 690 F.2d at 310) is completely irrelevant. The fact remains that SDRs have been accepted by the United States as the modern international unit of account (*see supra* p. 31) and, as such, are in no way undercut by the continued pendency of the Montreal Protocols.

In sum, the Second Circuit's rejection of SDRs as the Warsaw conversion unit is entirely without merit. SDRs have taken the place of gold in the international economic system; the Warsaw signatories have indicated in the Montreal Protocols that SDRs should take the place of gold in Article 22 of the Convention; and the recent trend among signatory states has, in fact, been to adopt SDRs through administrative orders (*see supra* note 38), legislation (*id.*) or judicial interpretation (*see supra* pp. 33-34).[43] Therefore, if the last official price of gold is not adopted as the conversion factor for the Warsaw gold provisions, it is respectfully submitted that SDRs are the proper alternative.

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43 This recent worldwide trend toward the use of SDRs as the Warsaw conversion factor is of particular importance since uniformity of interpretation and result was a principal goal of the drafters. "A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible." *Block v. Compagnie Nationale Air France*, 386 F.2d at 337-38.

CONCLUSION

For all the foregoing reasons the Judgment of the United States Court of Appeals for the Second Circuit should be modified insofar as it holds the limitation of liability provisions of the Warsaw Convention prospectively unenforceable; the last official price of gold or, in the alternative, SDRs should be designated as the conversion factor for the Warsaw Convention's limitation of liability provisions.

Dated: New York, New York
August 29, 1983

Respectfully submitted,

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APPENDIX

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CHAMIE V. EGYPTAIR,

No. 80-12.428, Cass. Civ. Com.,

France (Mar. 7, 1983)

TRANSLATION

COMM.
COUR DE CASSATION (Supreme Court of Appeals)

Public Trial of March 7, 1983 Highest Appeal

Justice SAUVAGEOT, Presiding Decree No. 231

Index No. 80-12.428
of April 29, 1980

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

THE SUPREME COURT OF APPEALS, COMMERCIAL DIVISION, has handed down the following decree:

On the appeal filed by the Compagnie Nationale Egyptienne de Transports Aériens—Egyptair—a corporation located in Héliopolis, Cairo, Egypt, represented by its current President/General Manager AIDAROS, with branch offices at 1 bis, rue Auber, Paris 9, represented by its Chairman of the Board of Directors, EL MELEHY,

appealing a decree issued on January 31, 1980, by the Court of Appeals of Paris, in favor of Ms. Luica Jafalian Chamie, residing at 30 allée Zamenoff, Valence, Drôme,

respondent in the appeal.

In support of its appeal the plaintiff cites three grounds for appeal, the third of which reads as follows:

"The appeal objects to the decree being appealed in that said decree orders an airline to pay 12,500 francs for the loss of 50 kilograms of checked baggage, with interest from the date of the complaint at the statutory rate, on the grounds that the judge may not refuse to rule on the grounds that the law is silent, obscure, or inadequate; whereas since April 1, 1978, the disappearance of the official franc-gold parity makes it impossible to apply the rule of conversion of account units into national currency; whereas the present French franc may only be used to convert into the national currency the francs of the Warsaw Convention, and must be recognized as having a value equivalent to the 1926 French franc on the international level, but without reference to gold; (1) Whereas the judge may not substitute for the parties to an International Convention by replacing a clause he declares inapplicable with a new and completely different provision; whereas in ruling as it did the Appeals Court violated Article 4 of the Civil Code through incorrect application; (2) Whereas assuming as inapplicable the clause referring to the gold franc for the limitation of liability of the air carrier, this inapplicable clause cannot render null and void the agreed limitation of liability which thereupon can be cited against the passenger; whereas in ruling as it did, the Appeals Court violated Article 23 of the Warsaw Convention through incorrect application."

Whereupon, THE COURT, at public trial held on this date,

Considering the Report of Counsellor Jonquères, the comments of Boré, Capron, and Xavier, P.C., attorneys for the Compagnie Nationale Egyptienne de Transport Aériens, the observations of Mr. Boullez, attorney for Ms. Chamie, the pleadings of Mr. Cochard, Attorney General, and due deliberation having been had pursuant to law;

Concerning the third grounds of the appeal, part one thereof:

In consideration of Article 22 of the Warsaw Convention of October 12, 1929;

Whereas, according to the decree being appealed, on August 26, 1976, Ms. Chamie travelled from Damascus to Paris, via Cairo, on a flight provided by the Compagnie Nationale Egyptienne de Transport Aériens (Egyptair); whereas during this trip three suitcases belonging to said passenger, and having a total weight of 50 kilograms, were lost; whereas said passenger, who had not submitted a declaration of value upon departure, cited the provisions of Articles 22-2 and 22-4 of the Warsaw Convention of October 12, 1929, and filed a claim for an indemnity computed in accordance with the price of gold on the Paris free market; whereas Egyptair, upon being served with the demand for payment of this indemnity, challenged Ms. Chamie's interpretation of this international convention and, finding this demand unwarranted, offered her an indemnity of 4,900 francs;

Whereas, after finding that the method of computing the loss-of-baggage indemnity specified in Article 22-4 of the Warsaw Convention and referred to in the transportation contract binding the parties was not applicable in this action, the Court of Appeals, stating that the judge may not refuse to render judgment on the pretext of silence, obscurity, or inadequacy of the law, ruled that the indemnity owed by Egyptair to Ms. Chamie was to be evaluated by taking into consideration only the value of her baggage in French national currency on the date of the judgment, and, because of the indemnity ceiling, the court fixed said indemnity at 12,500 francs;

Whereas, in imposing upon the parties a method of computation different from the one provided for in the Warsaw Convention, notwithstanding the fact that when the provisions of a diplomatic treaty submitted to their interpretation involve the public monetary order as per the international agreements in effect, judges ruling on the merits must request the official interpretation thereof given by the government agency and shall conform to it, the Court of Appeals violated the provision hereinabove mentioned;

NOW THEREFORE, and without any necessity to rule on the other grounds of the appeal,

RESCINDS AND VACATES the decree handed down on January 31, 1980, by the Court of Appeals of Paris; consequently, restores the action and the parties to the same and similar condition in which they were prior to said decree, and in order to render them justice returns them to the Court of Appeals of Paris, composed of other judges appointed for that purpose by special ruling in Counsel Chambers;

Orders defendant to pay to plaintiff the sum of twenty francs eighty-five centimes by way of expenses, not including the cost of serving this decree;

Orders the Public Prosecutor attached to the Supreme Court of Appeals to have this decree printed and transmitted for recording in the records of the Court of Appeals of Paris, in the margin or at the end of the vacated decree;

So ordered, adjudged, and decreed by the Supreme Court of Appeals, Commercial Division, at public trial on March seventh one thousand nine eighty-three;

Present: Justice Sauvageot, Presiding; Justice Jonquères, rapporteur; Justices Perdriau, Gigault de Crisenoy, Fautz, Bargain, Delmas-Goyon, Bonnefous, Defontaine, Hatoux, Dupré de Pomarède, Le Tallec; Desgranges and Dupieux, referendary Justices; Mr. Cochard, Attorney General; Ms. Sivigny, Division Clerk.

CERTIFICATE OF ACCURACY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Eileen B. Hennessy, being duly sworn, deposes and says that (s) he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s) he is thoroughly familiar with the French and

English language and that (s) he translated the attached document relating to:

Ruling on Appeal

from French language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ EILEEN B. HENNESSY
Eileen B. Hennessy

(Jurat dated Aug. 12, 1983 omitted in printing)

COSTELL V. IBERIA, LINEAS AEREAS DE ESPAÑA, S.A.,

No. 255, Court of Appeal of Valencia, Spain

(Oct. 16, 1981)

TRANSLATION

1st R. 498/80

Served Oct. 16, 1981 (stamped seal)

RULING NUMBER 255

Honorable Justices:

—Presiding
Hon. José Bermudez Acoro

—Justices
Hon. Julio Gallardo Lamas
Hon. Adolfo Fuertes Pintas

In the City of Valencia, on October fourteenth, one thousand nine hundred eight-one.

The First Civil Division of this Jurisdiction, acting in matters involving less than a specified sum, brought before the Court of First Instance

Number One of Valencia by Mr. Manuel-Luis de la Llave Costell against Iberia, Lineas Aéreas de España, S.A., a company, for payment of a sum of money, and pending before said Division pursuant to an appeal filed by the plaintiff, represented and defended by his attorney, Rodolfo Castro Novella; the respondent, Iberia, Lineas Aéreas de España, having appeared herein by its representative, Mr. Ignacio Zaballos Ferrer, under the guidance of José Gonzalez Palenzuela, Esq.,

INCORPORATING the WHEREAS clauses of the decision being appealed,

WHEREAS said decision, handed down by the Judge of First Instance Number One of Valencia on September twelfth one thousand nine hundred eighty, contains the following: "ADJUDGED: Ruling in favor of part of the demand made by Rodolfo Castro Novella, Esq., on behalf of Mr. Manuel-Luis de la Llave Costell, it should be found and adjudged that the defendant, Iberia, Lineas Aéreas de España, S.A., is responsible for the loss of a suitcase weighing fourteen kilos and belonging to the plaintiff, as a result of its loss en route between Milan and Valencia on June 3, 1979, ordering the defendant to pay to the plaintiff damages in a peseta amount equivalent to $240 at the official rate of exchange on said date, rejecting the other demands of the plaintiff with release to the defendant, all without express ruling ordering payment of the costs of the action. . ."

WHEREAS an appeal was filed against said judgment by the plaintiff, within due time and form, and admitted on both accounts, and the file of the case was received by this Court, before which the parties appeared on the date set; the appeal was heard at a trial held on the second day of this month, at which Counsel for the parties presented their pleadings and moved for a ruling in accordance with the demands of their respective clients;

WHEREAS the provisions of law were complied with, except as stated in the first report;

The Hon. ADOLFO FUERTES SINTAS, Justice, having prepared the opinion of the Court,

The WHEREAS clauses of the decision appealed being accepted except insofar as they conflict with the findings hereinafter set forth;

WHEREAS this action began with a demand by plaintiff for payment of damages occasioned by the loss of a suitcase checked by plaintiff during his return trip to Valencia, Spain, from Milan, Italy, with a stop in Barcelona, which said voyage was made on an aircraft of Lineas Aéreas Iberia, the questions raised being the following: (a) The nature of the carrier's liability; (b) Whether said liability is limited by valuation criteria previously established, or whether it must be adjusted to the actual value of the items lost; (c) In either case, which method is applicable; (d) The question of the conversion into the national currency, especially as regards the date; (e) Possible error in computation; and (f) The subject of the damages, also demanded;

WHEREAS the carrier's liability as regards air transport of merchandise in cases like this one must be understood as legal in nature, since, aside from considerations of any other type and considerations of culpability for which the laws hereinafter cited do not establish a dispensation, it is certain that for non-international transport Article 120 of the Air Navigation Law of July 21, 1960, states, "The objective basis for indemnification is the accident or damage, and it will apply up to the liability limits established in this chapter (Chapter XIII), in all cases, including that of fortuitous accident, even when the transporter, carrier, or its employees can prove that they acted with due diligence," and that the Warsaw Convention of October 12, 1929, signed by Spain, and The Hague Protocol that amended it on September 28, 1955 (published, respectively, in the Madrid Gazette of August 21, 1931, and the Official Government Journal of June 4, 1973), provide in Article 18 that the carrier is liable for damage caused in cases of destruction of, loss of, and damage to checked baggage and to merchandise when the damage thereby caused occurs during

air transport, which includes the period during which the objects are in the carrier's custody. It should be noted that The Hague Protocol, which merely modified the Convention, took effect in Spain on March 6, 1966;

WHEREAS in view of the nature of the legal obligation, with an objective basis demonstrating the liability alleged, and which undoubtedly for that reason was never in dispute, only the amount demanded being disputed, there is also no doubt that in determining the amount of indemnity that should be paid in each case the methods established by domestic legislation or international agreements for the respective cases should be used; but it is not feasible, as the appellant plaintiff maintains, to verify the actual value of the items transported and (in this particular case) lost, first, because the texts cited so provide, and second, because the limitation-of-liability clause, which has become the norm in this type of traffic, constitutes part of the passenger ticket and baggage check ticket (page 155, reverse), and it ultimately liberates the injured party from the burden of proof as regards the contents of the lost baggage, giving the party the opportunity to declare a higher value upon payment of a higher amount, which said declaration was not made in this case;

WHEREAS it may be enough to refer to the relevant text included in the passenger ticket and baggage-check ticket in order to prove that the method to be applied in computing the proper indemnity in this case is that of US$ 20 per kilogram of weight for the lost ba gage; but it should be pointed out that this dollar indemnity specified by Iberia in the "general conditions" of its transportation contracts is merely a transcription and an adaptation of the provisions of the "General Transportation Conditions (Passengers)" applicable unless otherwise provided by international conventions in effect, or supplementary to said provisions; it must also be kept in mind (since we are speaking of supplementation) that Article 125 of the Air Navigation Law of Spain, hereinabove cited, provides that in the absence of an international agreement binding upon Spain international air transport liability will be governed by said Law applied reciprocally, with a maximum of 50 Pesetas per

kilogram of weight; but this is not the case, since Spain signed the Warsaw Convention as amended by The Hague Protocol, which requires compliance with the limit of two hundred fifty Francs per kilogram unless the sender makes a special declaration of value; because the gold standard is not in effect in the international monetary system, IATA, and Iberia as a member of IATA, specify in their general conditions the dollar equivalent of the 250 Poincaré franc limit, the approximate equivalent whereof is at the present time US$ 20; whereas the accuracy of this determination is proven by the fact that Additional Protocol Number 1, annexed to the final document of the International Air Law Conference held in Montréal in September 1975, proposes an amendment to Article 22 of the Warsaw Convention limiting the carrier's per-kilogram liability to 17 Special Drawing Rights, a conventional monetary unit of the Drawing Rights defined by the International Monetary Fund and representing the average value of a series of strong national currencies of countries that are members of the Fund; this points toward the abandonment of the classic patterns of monetary systems which are already outmoded, and the appearance of a new value indicator that at this time (October 1, 1981) is quoted at US$ 1.1446 per Special Drawing Right; when this amount is multiplied by 17, pursuant to the said Additional Protocol (which has not yet become effective), the result is US$ 19.4582, which said amount is approximately equal to the amount recognized by the defendant and approved in the decision under appeal as a quantitative indemnification method for each kilogram of weight, which said method should be used;

WHEREAS the question of which date must be used in converting into pesetas the U.S. dollar indemnity has not been discussed, but the date of June 3, 1979, the date of the loss of the suitcase, is specified in the [word illegible]; since this affects the applicable amount, which amount is clearly and specifically determined in the international conventions cited, should be reviewed; said international conventions refer to the value of the national currency "on the date of the judgment" (Article 22 of the Warsaw Convention, in the new wording contained in

The Hague Protocol of September 28, 1955), a criterion that moreover coincides with the one used by our Highest Court in its judgment of November 9, 1957, for the amount of a dollar-denominated travellers check presented for collection;

WHEREAS the judgment appealed was based on an error in the answer to the complaint, the indemnity amount being incorrectly computed as regards the peseta equivalent of US$ 240; the lost suitcase weighed fourteen kilograms, which multiplied by twenty gives a total of $280, which said amount is the indemnity to be paid;

WHEREAS with regard to the compensation for moral damage or professional prejudice also alleged in the complaint, the grounds set forth by the Judge *a quo*, and deemed reiterated herein in order to avoid repetitions, warrant confirmation of the judgment that rejected same;

WHEREAS the correction needed in the judgment appealed because of the incorrect computation, and the legal complexity of the case, justify waiver of express order regarding the costs of this action;

WE RULE:

That considering only what is necessary in the appeal filed by the attorney for Mr. Manuel Luis de la Llave Costell against the ruling issued in the first instance of this action, Iberia, Lineas Aéreas de España, S.A., being the defendant, we confirm said ruling except as regards the amount payable by the defendant to the plaintiff, which said amount is US$ 280, at the official rate in effect on the date of said ruling, and we make no express provision as regards the costs of this action. A textual certification of this ruling and the appropriate order from this higher court to the lower Court should be issued at the proper time, and the original file should be returned to the lower Court.

So adjudged, ordered, and signed, with calendar certification.

A TRUE COPY
Ignacio Zaballos

BA12

CERTIFICATE OF ACCURACY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Eileen B. Hennessy, being duly sworn, deposes and says that (s) he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s) he is thoroughly familiar with the Spanish and English language and that (s) he translated the attached document relating to:

Ruling on Appeal

from the Spanish language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ EILEEN B. HENNESSY
Eileen B. Hennessy

(Jurat dated Aug. 12, 1983 omitted in printing)

KISLINGER V. AUSTRIAN AIRTRANSPORT

No. 1 R 145/83,

Commercial Court of Appeals of Vienna, Austria

(June 21, 1983)

TRANSLATION

(stamp)
Received on:
13 July 1983
Law Offices
Dr. J. Lenz

(stamp)
District Commercial Court
Vienna
Received on 27 June 1983

BA13

IN THE NAME OF THE REPUBLIC

145/83

The Commercial Court of Vienna, as the Court of Appeals HR Dr. Alfred Obermayer—Marnach as Presiding Judge, as well as the additional Judges, Dr. Ernst Kreimel and KR Dr. Otto Strobl, in the matter of the plaintiff, Dkfm. Marietta Kislinger, professor, Hafnerstrasse 29, 4020 Linz, represented by Dr. Alfred Haslinger, Esq., Kroatengasse 7, 4020 Linz, v. the defendant company, Austrian Airtransport Osterreichische Flugbetriebgesellschaft, 1010 Vienna, Schwarzenbergplatz 2, represented by Dr. Josef Lenz, Esq., 1060 Vienna, Gumpendorferstrasse 11, for S. 6,588.32, concerning the appeal by the plaintiff against the ruling of the Commercial District Court of Vienna of 21 February 1983, SZ 11 C 140/82-13, after public oral appeal proceedings, has ruled:

The appeal is *not* granted.

The plaintiff is obligated to compensate the defendant for the costs of the appeals proceeding, set at S. 2,708 (including S. 190.98 Turnover Tax and S. 130.00 out-of-pocket expenses) within 14 days, effective immediately.

Bases for the Decision:

According to the undisputed findings of the disputed ruling, the plaintiff, on her flight OB 4,238 from Madrid to Vienna on 20 April 1981 with the defendant as air freighter, lost her photographic equipment from one of her two pieces of luggage checked in at the airport, and this, from an approximately 10 kg travelcase; the purchase price of said photographic equipment was S. 13,360.40. The plaintiff had not expressly declared, at the counter when checking in her luggage, that there was photographic equipment in her luggage. Concerning this, it was established beyond dispute that the plaintiff had not

expressly been made aware of the notes contained in the ticket about transportation conditions and that the items lost had a weight of 3 kg.

The plaintiff now desires from the defendant, which had compensated her S. 4,100.00 on the occasion of the above event, the additional amount of S. 6,588.32 plus 4% interest from 1 May 1981, as the difference between the present value of her photographic equipment and the compensation sum paid her by the defendant. The maximum liability amount of 250 francs, established in Article 22, Paragraph 2, Letter a) of the Warsaw Agreement (WA) is to be converted into Austrian Schillings according to the value standards contained in Article 22, Paragraph 5 *leg. cit.*, based on the market price for an amount of gold corresponding to the metal content of the fictive franc, because since April 1978, no fixed ratio has existed between the individual currencies and gold. The liability amount estimated by the defendant at S. 410.00 per kg of luggage is thus to be estimated approximately 10 times as high.

The defendant has disputed and essentially objected that the price of gold on the free market is today a result of international speculation with extraordinarily large variations and no longer a means of stabilizing parities and purchasing power. It is therefore also no longer suitable as a determinable value scale. Even before the departure from the gold parity, there had been a market price in addition to the official parity, so that even at that time, the calculation of the International Liability Limits was not to be made based on the "free market gold price" but on the currency gold parity. The WA does not therefore indicate the price for fine gold, but the gold franc, as the value comparison scale. If the plaintiff's opinion is correct, the market price should have been used even before the gold standard was given up, which certainly cannot be maintained based on the text of the agreement.

With the dropping of the currency parity on the gold basis, therefore, a conversion of this type is possible only with a value scale that is also substituted internationally therefor and to which, finally, the currency gold parity is referred. These are the Special Drawing Rights (SDRs), whereby a conversion

amount of 1/15 of a Special Drawing Right results for one franc. This could not be replaced by gold price notations in the free market, because otherwise a value scale would be employed which is different from that contained in the treaty, contrary to the goals of the signatory nations at the time the treaty was concluded.

Based on Article 2 of the German Law of 15 December 1933, RGB1.I/S 1079, valid in Austria, 100 francs are equivalent to 16 Reichsmarks. This provision is supported, pursuant to Article 151 of the Aviation Law of 1957 with the measure that in place of the above-cited Reichsmark amounts, six times the Schilling amount is to be used. From this, a kilo is calculated at the Schilling amount of S 240.00; since the defendant has used the rates for domestic liability of S. 410.00, more than the compensation rate has been used and paid. Moreover, the defendant is completely free of liability according to its transportation conditions for such types of luggage.

With the disputed ruling, the lower court rejected the claim, wherein the starting point was the above state of affairs. In essence, it ruled that the WA, in the version of the Additional Protocol of The Hague, is to be applied thereto. According to this, the nonliability claimed by the defendant is void, for which reason it must compensate the plaintiff for the damages according to Article 22 of the WA at the maximum liability amount stated in this agreement for luggage. The value scale for francs, stated in Paragraph 5, *leg. cit.*, of 65.5 mg gold with a fine gold content of 900/1000 is to be converted into Austrian Schillings, based on the German Provisions of RGB1. 1933/I, S. 1079, introduced with the Gesetzblatt für das Land Österreich [Legal Gazette for the Country of Austria] No. 732/1939, which was validated by the 1957 Aviation Law in such manner that Schilling amounts six times the Reichsmarks amounts are to be used in place of the stated Reichsmarks amount. According to this, however, a compensation amount of only S. 240.00 per kg is obtained, so that, taking the payments by the defendant into account, the plaintiff has received more than she is entitled to demand.

The plaintiff's appeal is directed against this ruling for reasons of incomplete determination of the state of affairs and

incorrect legal evaluation with the petition that the disputed ruling be amended in such manner that the claim be approved; secondarily, a motion of arrest in judgment is made.

The defendant has asked that the appeal not be approved.

The appeal is not justified.

However, we must agree with it that the conversion made by the lower court does not correspond to the applicable jurisprudence. But there is nothing to be won from it for the plaintiff, as will be shown below. The jurisprudence represented in the disputed ruling concerning the conversion to be made of the hypothetical key currency was valid only until 30 September 1963. Article 29 *h* of the Aviation Law, first validated by Article 151, Paragraph 1 of the Aviation Law in the version of BGBl. No. 253/1957, according to which the damage, in the case of an international air transportation, was to be treated pursuant to RGBl. 1933/II, S. 1039, according to same and to the implementing decree RGBl. 1933/I, S. 1079, was profoundly amended by BGBl. No. 200/1963, in effect since 1 October 1963. Only the Warsaw Agreement of 12 October 1929 in the version of BGBl. 286/1961 replaces the above-cited German provisions. The former last version valid since 1 January 1972 received Article 29 *h* of the Aviation Law through BGBl. 236/1971 (Halbmayer—Wiesenwasser, Das Osterreichische Luftfahrtrecht [Austrian Aviation Law] II/1/1, Appendix II, Page 14). The standards cited at the beginning, arising from German jurisprudence, were thus formally derogated. Pursuant to the last-cited version of Article 29 *h* of the Aviation Law, the Warsaw Agreement in the version of The Hague, BGBl. No. 161/1971 is to be applied to the damage to be judged here, which arose on the occasion of a flight from Madrid to Vienna. This international agreement was transferred through the above-cited point in the Aviation Law into domestic law, and became directly applicable for the courts. The Warsaw Agreement, however, in view of its Article 23, Paragraph 1, is relatively coercive for air freighters in its uniform version, so that the lower court is to be concurred with in that the defendant, absent the applicability of Article 23, Paragraph 2 of the WA to the luggage lost here, cannot

successfully call on the contradictory provisions of Article 15, Section 3, Letter i) of the "General Conditions for the Transportation of Air Passengers and Luggage" of the AUA (Guldimann, Internationales Luftransportrecht [International Air Transport Law] 11, 136; Koziol, Osterreichisches Haftpflichtrecht [Austrian Liability Law] II, 415). The defendant is thus liable in principle for the loss of the plaintiff's luggage. The defendant's liability, however, is limited to 250.00 francs per kilogram of luggage according to Article 22, Paragraph 1 of the WA. Pursuant to Paragraph 5, *leg. cit.*, the calculation unit "franc" corresponds to a weight of 65.5 mg gold of 90.0% purity, i.e., the French gold franc of 1924—1936. This hypothetical currency unit must be converted for practical applications into a national currency. The Agreement leaves it to the applicable national law to provide the office competent therefor. In many cases, the conversion is made in implementation laws. In Sentence 3, the case is settled in which the conversion must be made by the judge in the absence of a long-term fixed ratio between the national currency and the value of gold, whereby the day of the ruling is to be used as the basis. The conversion here is to be made to rounded-off amounts, with approximately ±5% tolerance according to the "gold value" of the relevant national currency (Guldimann, *op. cit.*, 132).

Since, according to Austrian procedural law, the decision bases are to refer, in principle, to the time at which the hearings are closed in the lower-court case, and since it therefore involves, in the case of lost consigned goods, their value at the time the ruling is handed down (ZBl. 1924, 62), the Court of Appeals also holds that for the conversion in the case of a confirmatory ruling, only the time at which the ruling is handed down in the lower court case is the determining factor (Guldimann, *op. cit.*, p. 132).

Since the US ended the gold convertibility of the US dollar in 1971, the problem arose for the multilateral transport conventions, that used a fictive gold currency as the standard for liability limitation, of converting into the relevant national currencies, like the Austrian Schilling, that were not oriented towards a gold value, to the extent that domestic conversion standards had not existed or been created.

The Hamburg Higher Regional Court, in its precedent-setting decision of 2 July 1974, ETR 1974, 701, took the point of view that, after the last official gold counter-value had largely lost its economic importance as a reference point, the purpose of the above-mentioned regulations could best be fulfilled by using the key rate of the national currencies with respect to the SDRs, last set with the member states of the IMF, to determine the liability sum (Georg Groth, Ubersicht die internationale Rechtssprechung zu CMR [Overview of International Jurisprudence on the CMR], p. 76 FN 107).

A conversion of the "gold franc" into the relevant national currency via the Special Drawing Rights, however, was possible pursuant to the above decision until 31 March 1978. A method generally recognized as binding for converting the gold francs had not been established until then (Braun in transpR 1979, p. 9). Since 1 April 1978, however, there has been no connection between the SDR of the IMF and gold, because with the second supplementation of the so-called Article Agreement, any connection of the currencies to gold as a valuation standard was eliminated. Thus, in all international liability conventions, that used gold francs as a value scale, a lacuna arose (Braun, *op. cit.*, Richter-Hannes, Die UN-Konvention uber die Internationale multimodale Guterbefordering [The UN Convention on the International Multimodal Transportation of Goods], 154). The last-cited author, who also denies the possibility of converting the gold francs into the national currencies, based on the situation indicated, and who refers to the risk that could arise therefrom if jurisprudence generally followed the representatives of the real-value theory, that orient on the current market price of an amount of gold corresponding to the metal content of the fictive key currency, in this connection acknowledges that the convention involved would thus violate the intention and purpose of the liability limitations. The actual viewpoint of the member states consists in providing a liability limitation that, however, upon connection to the market value of the gold, would no longer be effective, and rather, in many cases would lead to an unlimited liability. This liability limitation is, however, an essential part of the risk

distribution and therefore is undertaken with a given concept of an amount for the extreme cause of maximum liability, weighing the various interests—even the insurability—and is therefore a compromise decision. The liability limitation should therefore be uniform and as independent as possible of accidental variations in the currency systems. This finally led to the introduction of a fictive gold currency. In theory, it should remain nominally constant until the member states decide on a change in the nominal sum, over longer periods of time, because they intend to introduce a greater liability or because the real value has changed quite decisively.

A reasonable solution, therefore, can be found only with a regulation that avoids sudden variations, to maintain the purpose of the liability limit, with which the majority of the specialist press agrees (Richter-Hannes, *op. cit.*, p. 155, 157, and the citations further indicated in Footnote 205).

Since the Warsaw Agreement is directly applicable to the domestic area for the above reasons, its Article 22 is to be interpreted, or a solution to be sought by analogy, not indeed based on Article 31, Paragraph 1, BGBl. No. 40/180, but rather according to Sections 6 ff of the General Civil Code. It is therefore appropriate to seek a way that corresponds to the extent possible to the liability limitation system standardized in the WA, the basic tendency of which has been stated above, if one does not wish to assume the point of view that a spurious gap has arisen in the law due to the dropping of the gold parity and the maximum liability limits have become completely inapplicable. The way proposed by Braun, *op. cit.*, is offered on the basis of the above decision of the Higher Regional Court of Hamburg. As of 31 March 1978, the following ratios resulted: 1 SDR = 0.888671 g fine gold 1000/1000; 1 gold franc (according to CMR, CIM, CIV) = 10/31 g fine gold 900/1000; three gold francs = 1 SDR.

Converted to the gold francs of the WA with 0.0655 g fine gold 900/1000, this results in 15 gold francs to one SDR. Apparently, starting from the same ratios, the Gold Franc Conversion Law of the Federal Republic of Germany, BGBl. 1980/II, 721, among others, in its Article 2, Paragraph 1, has

converted the value unit 65.5 mg gold 900/1000 pure content via the SDR of the IMF in such manner that 15 value units equals one SDR. Austria, as well, has gone the same way in the Gold Franc Conversion Law, BGBl. 319/1979, but only for the areas of the CIM and the CIV, whereby one SDR equals three gold francs (10/31 g fine gold 900/1000), as the Federal Republic of Germany has also done in Article 4 of its Gold Franc Conversion Law.

For the further considerations, we can use as a starting point that as of 31 March 1983, 15 gold francs in the Warsaw Agreement corresponded to one SDR. In this version, the Court of Appeals is also reinforced by the fact that IATA in its "Passenger Services Conference Resolutions Manual", 3rd Edition, Effective 1 January 1983, in Article 1: Definitions, starts from the same ratio.

The essence of the type of liability limitation selected by the WA, however, prohibits seeing a hard and fast value even in this. Rather, even here, it requires on-going adjustment to the changing value ratios. However, this cannot take place, for the above-mentioned reasons, via the market value of the gold, but rather via the rate for the SDR, as Article 2 of the Austrian Gold Franc Conversion Law for the areas of the CIM and the CIV provide, and this, because it appears applicable by analogy here, to the extent that it pursues the same goals. According to it, for the conversion of the abstract maximum liability limit of the WA for luggage, the value of the SDR in Austrian Schillings at the time the ruling is handed down is decisive. Since the lower court, starting from the existence of the domestic conversion provision applied by it, but already derogated, did not increase the rate of the SDR at the time the ruling was handed down, the proceedings were in need of supplementation to that extent, for which reason the Court of Appeals itself obtained the necessary information from the National Bank, pursuant to Article 496, Paragraph 3, Civil Procedural Code. According to this, the value of the Special Drawing Rights as of 21 February 1983 was 18.43569 Austrian Schillings. This results in a maximum liability limitation of 250.00 gold francs, with a countervalue in Schillings of approximately 308.00.

From all this it becomes clear that the only determination desired by the plaintiff on the appeals ground of "incomplete determination of the state of affairs", concerning the market value of a quantity of gold of 0.0655 g with a fine content of 900/1000 is irrelevant here.

The plaintiff has suffered the loss of only 3 kg of luggage, which can be valued per se, and which had no influence on the value of the rest of the luggage. She has received as compensation, even before the lawsuit, from the defendant S. 4,100.00, i.e., more than was legally owed her, so that her request for yet more is unjustified. She would have had a claim to a greater value for the lost items only if a corresponding declaration had been made.

The appeal therefore must be rejected for all the above reasons.

The decision concerning costs was based on Articles 41 and 50 of the Civil Procedural Code.

Commercial Court of Vienna
1011 Vienna, Riemergasse 7
Part 1, on 21 June 1983

/seal of the Court/ /stamp/
Dr. Alfred Obermayer - Marnach
For the accuracy of the copy,
the Head of the Business
Division:
/illegible signature/

CERTIFICATE OF ACCURACY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Susan E. Geddes, being duly sworn, deposes and says that (s)he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s)he is thoroughly familiar with the German and

English language and that (s)he translated the attached document relating to:

Two court rulings on appeals concerning Austrian Airlines monetary liability in freight losses.

from German language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ Susan E. Geddes

(Jurat dated Aug. 12, 1983 omitted in printing)

RENDEZVOUS-BOUTIQUE-PARFUMERIE FRIEDRICH UND ALBINE BREITINGER GMBH V. AUSTRIAN AIRLINES,

No. 14 R 11/83,

Court of Appeals of Linz, Austria

(June 17, 1983)

TRANSLATION

(stamp)
General Reception Office
of the District Court for
Linz State and Surroundings
and of the Linz Labor Court

(stamp)
Received
on: 12 July 1983
Law Offices
Dr. J. LENZ

(stamp)
Received on 30 June 1983

14 R 11/83

IN THE NAME OF THE REPUBLIC!

The LINZ District Court, as the Court of Appeals, through LGV Presiding Judge Dr. Krichmayr, as the Presiding Judge, as well as Dr. Wanko and Dr. Nagele as assisting Judges, in the matter of the plaintiff company Rendezvous-Boutique-Perfumerie Friedrich und Albine Breitinger Gesellschaft mbH, 4020 Linz, Landstrasse 57, represented by Dr. Alfred Haslinger, Attorney in Linz, v. the defendant party AUSTRIAN AIRLINES Osterreichische Luftverkehrs-Aktiengesellschaft, 1107 Vienna, Fontanastrasse 1, represented by Dr. Josef Lenz, Attorney in Vienna, concerning S. 5,433.00 Austrian Schillings, concerning the appeal of the defendant against the ruling of the Linz State District Court of 18 October 1982, 2 C 982/81-15, after oral appeal proceedings, has ruled:

The appeal *is* granted and the disputed ruling is *amended*, so that it must read as follows:

"The claim petition, that the defendant should pay the plaintiff S. 5,433.00 plus 5% interest within 14 days, is rejected.

The plaintiff must compensate the defendant the suit costs for the lower-court case of S. 10,399.12 (including S. 745.12 Turnover Tax and S. 340.00 out-of-pocket expenses), within 14 days, effective immediately.

The plaintiff must compensate the defendant for the costs of the appeal, set at S. 3,240.37 (including s. 226.77 Turnover Tax and S. 180.00 out-of-pocket expenses) within 14 days, effective immediately.

BASES OF THE DECISION:

The plaintiff requests an amount of S. 5,433.00 plus 5% interest from 1 October 1980 as compensation for the loss of 4 blouses during the air freighting from Rome to Linz-Horsching, performed by the defendant.

The defendant acknowledged the complaint as far as concerns the amount, but disputes the basis therefor, petitions for rejection of the complaint involving costs, and objects that it is liable only for those damages that were ascertained before the

customs dispatch of the goods, as long as the freighted goods were therefore still in the custody of the air freighter; in the declaration of goods for customs purposes, only 7 blouses were missing, for which the plaintiff has already been held harmless with an amount of S. 11,355.72 for the whole. In addition to this, the maximum liability limit has already been exceeded by far, according to Article 22 of the Warsaw Agreement, with this payment.

With the ruling of the Linz State District Court of 18 October 1982, 2 C 982/81-15, the defendant was held to owe the plaintiff the sum of S. 5,433.00 plus 5% interest from 1 October 1980, and the costs of the suit, payable within 14 days.

The lower court made the determinations contained in its decision on pages 3 through 6.

From a legal point of view, the lower court stated that the property damage was subject to the provisions of the Warsaw Agreement in the version of the 1955 Amendment as well as the 1961 Additional Agreement ratified by Austria without reservations. The custody of the defendant and thus the period for air freighting that is a decisive factor in the liability, ended with the transfer of the goods to the plaintiff's shipped (sic) on 2 September 1980. Furthermore, the air freighter was responsible for all damages that occurred during air freighting and not merely for those that were determined during air freighting, and therefore until loss of the custody by the air freighter. Article 22 of the Warsaw Agreement in the applicable version limits liability of the air freighter during transport to 250 francs per kilogram. In the event of loss of only individual items, only the (original) total weight of the freight items involved is taken into consideration in determining the maximum liability amount. Since, of the loss, only 3 or 4 cartons were involved, there are no indications that the cartons differed signficantly in size from one another, a weight of approximately 13.5 kg results for the 3 freight items involved. A [illegible word] pursuant to Article 22 of the Warsaw Agreement refers, pursuant to Article 5 of this provision to a currency unit with a value of 65.5 mg gold with a fine content of 900/1000. 250 francs correspond, therefore, to a gold value

of 16.375 g. At the time of the lower court's decision, the price of gold per gram, with a fine content of 900/1000 came to exactly S 242.639; the maximum liability amount per kg of freight therefore came to S. 3,973.21, and for the freight items involved, therefore, to S. 53,638.33. From this results the fact that the maximum liability limit was in no way exceeded by the defendant's payment of S. 11,355.72.

The defendant did not produce relief evidence according to Articles 20 and 21 of the Warsaw Agreement.

The on-time appeal of the defendant is directed against this decision on the appeals ground of incorrect legal evaluation, with the petition that the disputed ruling be altered in such manner that the complaint is rejected.

The plaintiff prepared a written communication of appeal and raised therein the petition repeated in the oral appeal proceedings, that the appeal not be granted and that the first ruling be upheld.

The appeal is founded.

The appellee essentially states that the maximum liability amounts in the Warsaw Agreement referred sensibly to French francs (Poincare Francs) as long as the official gold parities were determined and the International Monetary Fund bound the settlement unit (Special Drawing Rights) to the gold standard. Since the elimination of the link between Special Drawing Rights and gold, and since the dropping of gold parities for currencies and the raging increase over time in gold prices, due to speculation on the free market, the maximum liability amount under the Warsaw Agreement is to be replaced by a corresponding number of Special Drawing Rights from the International Monetary Fund, whereby the conversion key of 1/15 Special Drawing Right to one Poincare Franc is to be used. From this it results that the compensation amount calculated by the defendant and paid for the entire shipment exceeds the actual liability limit of the defendant in the concrete case.

Here it should be stated that the Agreement of 12 October 1929 on the Unification of Regulations for Transportation in International Air Traffic (Warsaw Agreement) was signed on

12 October 1929 by the representatives of a series of States, one of which was Austria. Still in 1929, the official German translation of the Agreement, the authentic text of which is in French, was agreed upon between Austria, Germany and Switzerland. The Agreement was ratified by almost all air-trafficking countries in the world. The Warsaw Agreement was not ratified by Austria until Austria was occupied by Germany in 1938. The German Reich had already ratified it in 1933. With respect to this, it issued the law for implementation of the initial Agreement on Unification of Civil Air Law of 15 December 1933, (BGBl. I, 1079). After Germany's occupation of Austria, the Agreement also applied as a domestic standard for Austria (see also Article 1 of the Second Ordinance on the Introduction of German Air Law into the Ostmark, Legal Gazette for the Country of Austria No. 732/1939). The Warsaw Agreement was ratified by Austria first on 29 July 1961 and then went into effect on 27 December 1961 (BGBl. 1961/286). (Hammerle-Wunsch: Handelsrecht III (Commercial Law III), p. 367 f.; Note in Heinl-Loebenstein-Verosta: Das osterreichische Recht [Austrian Law], II f. 55).

The original Warsaw Agreement already limited the maximum liability amounts in Article 22. Article 22, Paragraph 4, read: "The above indicated amounts are expressed in French francs with a value of 65.5 mg gold of 900/1000 fineness. They may be converted, in rounded-off amounts, into the currency of any country."

The Warsaw Agreement does not define who the actual air freighter is. From this results a legal uncertainty. Therefore, on 18 September 1961, the Additional Agreement to the Warsaw Convention for the Unification of Regulations resulted from the ICAO Conference in Guadalajara (Mexico), concerning transportation performed by an entity other than the contractual air freighter in international air traffic, which was ratified by Austria on 29 September 1965 and went into effect here on 21 March 1966 (BGBl. 1966/46). The Addition Agreement does not state who the air freighter is, but places both the air freighter that concluded the transportation contract as well as the entity that executes the transportation contract, in a joint

liability community under the Warsaw Agreement (Note in Heinl-Loebenstein-Verosta, Das osterreichische Recht [Austrian Law] IIf ., 55/1).

The first change in liability provisions of the Warsaw Agreement occurred with the Hague Protocol of 28 September 1955, by which the Warsaw Agreement was amended; Austria entered into this Agreement, first effective 24 June 1971 (BGBl. 1971/161).

Pursuant to Article XI of this Hague Protocol, it was now provided in new Paragraph 5 of Article 22 of the Warsaw Agreement:

"The franc amounts indicated in this Article refer to a currency unit with a value of 65.5 mg gold of 900/1000 fine content. They can be converted, in rounded-off amounts, into the currency of any country. The conversion of these amounts into national currencies other than gold currencies shall take place, in the case of a court proceeding, in accordance with the gold value of these currencies at the time of the ruling."

Since, pursuant to the final sentence of the Hague Protocol, in case of doubt as well, the text in French governs, the last sentence of Paragraph 5 of Article 22 of the Warsaw Agreement in the version of the Hague Protocol follows in French (see BGBl. 1971/161):

"La conversion de ces sommes en monnaies nationales autres que la monnaie-or s'effectuera en case d'instance judiciarie suivant la valeur-or ces monnaies a la date du jugement."

["The conversion of these sums into national currencies other than gold currencies shall take place, in case of a court proceeding, pursuant to the gold value of these currencies as of the date of the ruling."]

The Hague Protocol now, is no longer based on the French franc, with respect to the Warsaw Protocol, rather only on the abstract gold francs defined in a certain manner. The newly added third sentence of Paragraph 5 of Article 22 of the Warsaw Agreement in the version of the Hague Protocol is based on the existence of gold currencies and states that the gold value of the national currencies governs for the other member countries. In the French text, a much clearer distinc-

tion is drawn between "monnaie-or" ["gold currency"] and "valeur-or" ["gold value"].

In 1948, Austria entered into the Agreement of July 1944 concerning the International Monetary Fund (BGBl. 149/105, effective for Austria on 27 August 1948). Article IV, Paragraph 1, Letter a) of that Agreement states the obligation that the parity of the currency of any member is to be expressed in gold as a general denomination or in US dollars of weight and fineness, as effective 1 July 1974. The original IMF Agreement therefore obligated the members to indicate an official parity for their currencies with respect to the US dollar or gold.

After giving up a multiple rate system maintained for a transitional period, Austria indicated to the IMF for the first time an official Schilling parity of S. 26.00 to US $1.00 that resulted, considering the then parity of the US dollar to gold ($35 = 1 ounce fine gold), in a parity of the Schilling to gold of 0.0341706 g fine gold to S. 1.00. This gold parity was clarified by Article 3, Paragraph 1 of the Customs Tariff Law of 12 March 1958, BGBl. No. 74, as a basis for the amount of customs rates and customs values.

On 1 August 1962, Austria assumed the obligations set forth in Article VIII of the Agreement on the IMF, whereby the Schilling became a convertible currency in the sense of Article XIX, Letter d) of the Agreement on the IMF.

Effective 10 May 1971, the Schilling was valued at:

S. 24.75 = $1.00

S. 1.00 = 0.0359059 g fine gold.

This change in gold parity became effective via the Amendment to Article 3, Paragraph 1 of the Customs Tariff Law, BGBl. 454/1971.

After elimination of the gold convertibility of the US dollar on 15 August 1971, Austria went to forming the exchange rate according to an indicator system, taking into consideration the rate trend in the stable currencies of its most important European trading partners. When the IMF, to facilitate re-arrangement of the parity ratios, tolerated the announcement of the so-called "key rates" and extended deviation ranges for

exchange rates on 18 December 1971 for a transitional period, Austria established the "key rate" effective 22 December 1971 of S. 23.30 to $1.00. The gold parity of 10 May 1971 was unaltered.

The international trend led, consequently, to two devaluations of the US dollar (new parity de jure effective on 8 May 1972, $38.00 and as of 18 October 1973, $42.22 per ounce of fine gold). Effective 13 February 1973, Austria, in anticipation of the later announced second devaluation of the dollar, changed the key rate to S. 20. 97 to $1.00. On 29 March 1973, a rate of S. 24.7405 was announced to the IMF for a value unit of the Special Drawing Rights introduced according to the IMF Agreement; one Special Drawing Right corresponded to 0.888671 g fine gold and thus to the gold parity of the US dollar existing as of 8 May 1972. (On 26 November 1969, the Federal Law concerning Austria's participation in the Special Drawing Rights system of the IMF, BGBl. No. 440/1969, had already been passed.)

With the IMF Convention going into effect in the version of the second agreement for all members on 1 April 1978 (BGBl. No. 189/1978), the gold parity of the Schilling last announced to the IMF lapsed; in connection therewith, Austria notified the IMF that its exchange rate regulation according to Article IV, Section 2 of the IMF Convention, was based on the intention of maintaining the rate of the Austrian Schilling near the rates of the states participating in the European Monetary Agreement ("currency snake") (Schwarzer-Csoklich-List, Wahrungs- und Devisen-Recht (Currency and Foreign Exchange Law), pp. 7 f.).

Article IV, Section 2, Letter b) of the now valid IMF Agreement states that within the framework of an international currency system of the type existing as of 1 January 1976, the following currency rate regulations, among others, were permissible:

"(i) Maintenance of the value of a currency by the concerned member in Special Drawing Rights, or in a standard selected by the member, other than gold."

In Appendix C, Point 1) of the Agreement, the Fund informed the members that for the purposes of this Agreement, parities, expressed in Special Drawing Rights or in another common denomination permitted by the Fund, could be established. The common denomination could not be gold or another currency.

In Article IV, Section 12, in Appendix B, Points 3) and 7), as well as in Appendix K, Point 2), a Special Drawing Right was set equal to a quantity of 0.888671 g fine gold.

Based on this historical trend, it results that the Warsaw Agreement of 12 October 1929 started from the basis of the French gold franc as a gold currency.

Since the IMF Agreement of July 1944 also provided a gold parity for the currencies of the member countries (neither directly nor indirectly via the gold-convertible US dollar), the last sentence of current Paragraph 5 of Article 22 of the Warsaw Agreement in the version of the Hague Protocol (also taking the French text into consideration) must be seen from this point of view. According to it, a distinction is made only between actual gold currencies and national currencies with gold parities. This means that the gold franc in the sense of the Warsaw Agreement is to be connected with the then official currency gold rate.

Through the cropping of gold currencies and through the ban on gold parities in the sense of the now valid IMF Agreement, Article 22 of the Warsaw Agreement in the version of the Hague Protocol has been materially derogated in connection herewith. This means that the gold quantities resulting from Article 22 of the Warsaw Agreement in the version of the Hague Protocol, are to be replaced, as a maximum liability limit, by a number of Special Drawing Rights within the framework of the International Monetary Fund.

On 1 January 1970, for the first time, Special Drawing Rights were allocated by the International Monetary Fund to the participants in this system. Pursuant to Federal Law of 26 November 1969, BGBl. No. 440, the Special Drawing Rights of the Republic of Austria were transferred to the Austrian

National Bank. Same is entitled to use the Special Drawing Rights as coverage for total circulation pursuant to Article 62, Paragraph 1 of the National Bank Law of 1955 in the applicable version, in their statements, they are to be seen as currency reserves. The value units of the Special Drawing Rights were set, at the time the system was founded, at 0.888671 g fine gold each, which corresponds to the then parity value of the US dollar. The transaction value of the Special Drawing Rights has been determined since 1 July 1974 based on the currency basket, and this first based on 16 currencies, but since 1 January 1981, on only 5 more currencies. The transaction value of one Special Drawing Right in Austrian Schillings as of October 1982 (i.e., the time of the lower court decision pursuant to Article 22, Paragraph 5, of the Warsaw Agreement in the version of the Hague Protocol), has come to 19.1397 (Communications from the Directorate of the Austrian National Bank, No. 4/1983, pp. 37 and 58).

In arithmetical terms, this means:

250 francs to 0.0655 g fine gold each result in a quantity of gold totalling 16.375 g. If one takes into consideration the fine content of 900/1000, this results in a quantity of fine gold of 14.7375 g. From the application of the key, 0.888671 g fine gold = 1 Special Drawing Right, there results accordingly for 250 francs in the sense of the Warsaw Agreement, an equivalent of 16.583752 Special Drawing Rights. If one employs the above-mentioned value of one Special Drawing Right, equal to S. 19.1397, this results in a maximum liability amount of S. 317.41 per kg. Consequently, in the present case, the defendant, via payment of an amount of S. 11,355.72, has completely met its compensation obligations in the sense of the Warsaw Agreement.

This result is further confirmed by the following considerations:

a) Pursuant to the above-mentioned Law on the Implementation of the First Agreement on the Unification of Civil Air Law of 15 December 1933, Reich Legal Gazette I, 1079, the maximum amount established in the French currency in Article

22 of the Agreement was replaced by the corresponding amount in German Reich currency. Upon conversion, 100 French francs were valued at 16 Reichsmarks.

Now the starting point is that for Austria, which, after 1945, was to be considered again as an independent entity subject to international law, did not ("automatically") ratify the Warsaw Agreement, even pursuant to Article 1, Paragraph 1 of the Legal Transition Law, State Law Gazette 6/1945, and thus, after 1945, it cannot be seen as widely valid. If one therefore accordingly uses the above-mentioned German Implementation Provision and if one converts, pursuant to Article 3, Paragraph 2 of the Schilling Law, State Law Gazette 231/1945 in the applicable version, the Reichsmark amounts into Schillings, in the ratio of 1:1, one derives a maximum liability amount of only S. 40.00 per kg.

b) The international convention on Rail Freight Traffic (CIM), on Rail, Personal and Luggage Transport (CIV), concluded on 25 February 1961 in Berne, BGBl. 744/1974, and the Additional Convention to the CIV on Railroad Liability for Death and Injury to Travellers, the upper limits of the railroads' liability are likewise limited with a set number of francs. However, gold francs weighing 10/31 g and of 0.900 fine content are considered francs in the sense of this Convention and its Appendices. Pursuant to the Federal Law of 3 July 1979, BGBl. No. 319/1979 (Gold Franc Conversion Law), the gold francs provided in Article 57, Section 1 of the International Convention on Rail Freight Traffic (CIM), BGBl. No. 744/1974, in Article 53, Section 1 of the International Convention on Rail, Personal and Luggage Transport (CIV), BGBl. No. 744/1974, and in Article 21 of the Additional Convention to the International Convention on Rail, Personal and Luggage Transport (CIV) on Railroads' Liability for Death and Injury to Travellers, BGBl. No. 201/1974, are to be converted into Austrian Schillings via the Special Drawing Rights of the International Monetary Fund, whereby 3 gold francs equal one Special Drawing Right. The value of one Special Drawing Right in Austrian Schillings is determined according to the

calculation methods employed by the International Monetary Fund for its own operations and transactions.

The Austrian legislature has accordingly set a fine gold quantity of 0.8709677 g equal to one Special Drawing Right of the IMF, for the area of international rail traffic. If this conversion key is applied to the gold francs in the sense of the Warsaw Agreement, as of October 1982, in the present case, a maximum liability amount of S. 323.86 per kg results.

c) The Ordinance on the Introduction of German Air Law into the Country of Austria of 1 April 1938, Reich Legal Gazette I, 355, introduced air-law provisions of the German Reich into Austria. What is still important today, and concerns liability, is, among others, the Air Traffic Law in the version of 21 August 1936, Reich Legal Gazette I, 653. The Air Traffic Law was changed first by the Law of 27 September 1938, Reich Legal Gazette I, 1246, and the law of 26 January 1943, Reich Legal Gazette I, 69. In this version it was transformed by the Legal Transition Law of 1 May 1945, State Law Gazette No. 6, into the Austrian Legal Ordinance and was still in effect until 31 December 1957.

The Air Traffic Law of 2 December 1957, BGBl. No. 253, went into effect on 1 January 1958. In Article 151 it introduces regulations on maximum liability amounts as well as on liability insurance and accident insurance, and in Article 152, the Air Traffic Law was eliminated with the exception of the first, second, third and fifth sub-sections of the second section. Thus, the public law provisions of the Air Traffic Law were voided and only the liability-law regulations were retained. The Federal Law of 11 July 1963, BGBl. No. 200, with which the maximum liability limits in air traffic law were raised, amended Articles 23, 29 c, 29 g and 29 h of the Air Traffic Law. With the Federal Law of 8 June 1971, BGBl. No. 236, the maximum liability limits were again increased.

With the latter amendment, the maximum liability amount comparable to the present case, but for domestic air traffic, was increased to S. 430.00 per kg, and this, as of 1 January 1972 (Heinl-Lebenstein-Verosta, Das osterreichische Recht [Austrian Law], V a 92).

The Government proposal of 13 June 1961 on the Warsaw Convention of 12 October 1929, BGBl. 1961/286 (RV 432 of the Blg. in the stenographic protocols of the NR, IX. GR), again stated that the scope of the French francs, stated in the Warsaw Agreement—and governing the present case—corresponded in value approximately to an amount of S. 450.00, since the corresponding amount in Article 29 c of the Air Traffic Law (in the applicable version) was S. 240.00, but an increase in the liability limits took place, that, with respect to the then economic relations, were thoroughly desirable for the legislature (see also Note 3 in Heinl-Loebenstein-Verosta, Das osterreichische Recht [Austrian Law] II f., 55).

In contrast to this, later, the increases in the maximum liability amounts in the Air Traffic Law by the Federal Laws of 1963 and 1971 were considered necessary, because Austria had entered into the Warsaw Agreement and the Hague Protocol, and was supposed to avoid a discrepancy in maximum liability amounts in national and international air traffic (Note in Heinl-Loebenstein-Verosta, Das osterreichische Recht [Austrian Law] V a 92).

The amount of S. 430.00 per kg was not increased by the 1976 Value Limits Amendment, BGBl. No. 91 (Article XXI).

The Austrian legislature has thus apparently taken into consideration that the present currency system leads to an interpretation of Article 22 of the Warsaw Agreement in the version of the Hague Protocol, that has even contributed to a reduction in the maximum liability amount applicable in international air traffic.

For all these reasons, the appellee's argument is accepted in that it has fully complied with its maximum liability amount derived from the Warsaw Agreement via the compensation paid by it. That the Warsaw Agreement in the version of the Hague Protocol applies in the present case results from Article 29 h of the Air Traffic Law in its applicable version.

Moreover, reference is made to the relevant and furthermore undisputed legal evaluation by the lower court.

Accordingly, the appeal of the defendant is completely granted and, in opposition to the first ruling, the complaint is rejected.

The ruling on the costs of the proceedings in the lower court case is based on Article 41 of the Civil Procedural Code. Here it must be taken into consideration that their incurrence has been proven by the defendant only to a limited extent.

The ruling on the costs of the appeals proceedings is based on Articles 41 and 50 of the Civil Procedural Code.

(illegible seal)

LINZ District Court, Part 14
on 17 June 1983
(stamp)
Dr. Alois Krichmayr
For the accuracy of the copy
The Head of the Business Division
(illegible signature)

CERTIFICATE OF ACCURACY
(duplicate of page A)

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Susan E. Geddes, being duly sworn, deposes and says that (s)he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s)he is thoroughly familiar with the German and English language and that (s)he translated the attached document relating to:

Two court rulings on appeals concerning Austrian Airlines monetary liability in freight losses.

from German language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ Susan E. Geddes

(Jurat dated Aug. 12, 1983 omitted in printing)

CANADA
CURRENCY AND EXCHANGE ACT:

Carriage by Air Act Gold Franc Conversion Regulations,

Jan. 13, 1983, 117 Can. Gaz., pt. II, No. 2, at 431 (Jan. 26, 1983)

P.C. 1983-19

His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 13.1 of the Currency and Exchange Act, is pleased hereby to make the annexed Regulations respecting conversion of values expressed in gold francs into Canadian dollar equivalents for purposes of subsection 2(6) of the Carriage by Air Act.

REGULATIONS RESPECTING CONVERSION OF VALUES EXPRESSED IN GOLD FRANCS INTO CANADIAN DOLLAR EQUIVALENTS FOR PURPOSES OF SUBSECTION 2(6) OF THE CARRIAGE BY AIR ACT

Short Title

1. These Regulations may be cited as the *Carriage by Air Act Gold Franc Conversion Regulations.*

Interpretation

2. In these Regulations,

"gold francs" means the francs referred to in subsection 2(6) of the *Carriage by Air Act*;

"S.D.R." means the special drawing rights issued by the International Monetary Fund.

General

3. For the purposes of subsection 2(6) of the *Carriage by Air Act,* the equivalent dollar value of gold francs shall be determined as follows:

(*a*) gold francs shall be converted into S.D.R.'s at the exchange rate of 15.075 gold francs per S.D.R.; and

(*b*) S.D.R.'s shall be converted into Canadian dollars at the exchange rate established by the International Monetary Fund for S.D.R.'s and Canadian dollars.

EXPLANATORY NOTE

(This note is not part of the Regulation, but is intended only for information purposes.)

These Regulations set out the method of converting the gold francs (an obsolete unit of account) referred to in subsection 2(6) of the *Carriage by Air Act* to Canadian dollars.

Registration SOR/83-79 January 14, 1983

ITALY
LAW NO. 84 OF MARCH 26, 1983

90 Gazetta Ufficiale della Republica Italiana (Apr. 1, 1983)

ART. 1

The amounts in gold frances Poincare' foreseen by Art. 22 of the Convention for the unification of some rules relative to the International air transportation, stipulated in Warsaw on Oct. 22nd 1929, are replaced by the following amounts:

—the amount of 125.000 gold francs Poincare', as per nbr. 1, is converted into 8.300 special drawing rights;

—the amount of 250 gold francs Poincare', as per nbr. 2, is converted into 17 special drawing rights;

—the amount of 5.000 gold francs Poincare', as per nbr. 3, is converted into 332 special drawing rights.

ART. 2

The amounts in gold francs Poincare' foreseen by Art. 22 of the Convention for the unification of some rules relative to the

International air transportation, stipulated in Warsaw on Oct. 12th 1929, as amended by Art. IX of the Protocol signed in Aja on Sept. 28th, 1955, are replaced by the following amounts:

—the amount of 250.000 gold francs Poincare', as per nbr. 1, is converted into 16.600 special drawing rights;

—the amount of 250 gold francs Poincare', as per nbr. 1, is converted into 17 special drawing rights;

—the amount of 5.000 gold francs Poincare', as per nbr. 3, is converted into 332 special drawing rights.

ART. 3

The amounts indicated in special drawing rights in the present law are considered as referring to the special drawing rights as defined by the International Monetary Fund. The conversion of these amounts in national currency shall be effected, in case of judicial action, by applying the official parity fixed by the International Monetary Fund at the time of the lawsuit.

The present law, with the seal of the State shall be inserted in the official register of the laws and decrees of the Italian Republic. Anyone is requested to observe it and to make it observed as a law of the State.

Rome, March 26th, 1983

/s/ PERTINI
Fanfani
Goria

SOUTH AFRICA
CARRIAGE BY AIR ACT
NO. 17 OF 1946

[ASSENTED TO 8 MAY, 1946]
[DATE OF COMMENCEMENT: 22 March, 1955]

(*Afrikaans text signed by the Govenor-General*)

as amended by

Carriage by Air Amendment Act, No. 5 of 1964
Carriage by Air Amendment Act, No. 81 of 1979

Stat. Rep. S. Afr. (Issue No. 13) 15

ACT

To give effect to a Convention for the unification of certain rules relating to international carriage by air; to make provision for applying the rules contained in the said Convention, subject to exceptions, adaptations and modifications, to carriage by air which is not international carriage within the meaning of the Convention; and for matters incidental thereto.

1. Definitions.—In this Act—
"Minister" means the Minister of Transport;

* * *

2. Ratification of Convention.—(1) The International Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw on the twelfth day of October, 1929 (hereinafter referred to as the Convention), is hereby ratified and confirmed.

* * *

3. Provisions of Convention to have force of law.

* * *

(7) Any sum in francs mentioned in Article twenty-two of the said Schedule shall for the purpose of any action

against a carrier be converted into currency of the Republic in the manner determined by the Minister in consultation with the Minister of Finance and notified by notice in the *Gazette*.

[Sub-s. (7) amended by s. 2 *(b)* of Act No. 5 of 1964 and substituted by s. 1 of Act No. 81 of 1979.]

DEPARTMENT OF TRANSPORT NOTICE R2031
SEPTEMBER 14, 1979

It is hereby notified that the Minister of Transport Affairs, acting in collaboration with the Minister of Finance, in terms of Section 3(7) of the the Carriage by Air Act, 1946 (Act 17 of 1946) has converted the sums in francs mentioned in Section 22 of the schedule to the said Act into the currency of the Republic in the following manner:

Sum Specified in Schedule in Act—Francs	*Currency of the Republic-Rand*
250 000	18 140,00
250	18,14
5 000	362,80

JC Heunis, Minister of Transport Affairs.

BA41

DEPARTMENT OF THE TREASURY
BUREAU OF GOVERNMENT FINANCIAL OPERATIONS

STATUS REPORT OF U.S. GOVERNMENT-OWNED GOLD
APRIL 30, 1983

*(Stated at Book Value of $42.2222 per Fine Troy Ounce)

SUMMARY

	Fine Ounces	**Book Value*
Gold Bullion	262,593,743.438	$11,087,285,554.19
Gold Coin	1,067,413.317	45,068,538.55
Totals	263,661,156.755	$11,132,354,092.74

Accountable Facility	*Gold Bullion*		*Gold Coin*	
	Fine Ounces	**Book Value*	*Fine Ounces*	**Book Value*
Fort Knox, KY	147,342,182.443	$6,221,111,095.54	—	—
In Transit to NY	46.043	1,944.04	—	—
West Point, NY	58,006,890.225	2,449,178,520.48***	992,143.872	$41,890,496.97
U.S. Assay Offices:				
**San Francisco, CA	3,340,077.339	141,025,413.41	—	—
U.S. Mints:				
Denver, CO	40,524,667.641	1,711,040,622.06	—	—
In Transit to NY	18.966	800.78	—	—
Philadelphia, PA	906.336	38,267.50	1,440.270	60,811.37
Federal Reserve Bank of New York (Gold Custody Account):				
FRB-NY Vault	13,377,755.714	564,838,277.32	73,451.741	3,101,294.10
U.S. Assay Office-NY	—	—	—	—
Federal Reserve Banks—(For display purposes)	1,198.731	50,613.06	377.434	15,936.11
Totals	262,593,743.438	$11,087,285,554.19	1,067,413.317	$45,068,538.55

**Includes 10,642.891 fine ounces with a book value of $449,366.27 in the form of 28 gold bars for display purposes at the San Francisco Old Mint Museum.

***This amount includes $60,290,025.71 (1,427,922.413 Fine Ounces) shipment received from bank of Canada-Ottawa, subject to verification.

Prepared by:
Monetary & Transit Accounts Section
General Ledger Branch
Division of Government Accounts & Reports

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